U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. LANTOS and DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD

Docket No. 00-2690; Submitted on the Record;
Issued March 11, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On August 20, 1998 appellant, a 31-year-old computer specialist, filed a claim for benefits based on occupational disease, alleging that he had developed an emotional condition due to factors of his employment. He was employed by the employing establishment as a professional service contractor from November 1994 through January 1995. In March 1995, he accepted a temporary, unpaid position with the employing establishment and served in this capacity until August 28, 1995, when he resigned.

In an August 21, 1998 statement, appellant alleged that he had developed a bipolar condition stemming from stressful working conditions. He stated that his supervisor, Dr. Mark E. Schmidt, Board-certified in psychiatry and neurology, had often attempted to act as his personal psychiatrist, which he considered inappropriate and unprofessional. Appellant stated that Dr. Schmidt advised him to seek psychological counseling and surreptitiously discussed his psychological condition with the department chief, Dr. William Z. Potter, Board-certified in psychiatry and neurology. Appellant stated that this caused him frequent and excessive discomfort, as he began to feel as if he were coming into work each day to see his psychiatrist rather than to perform his job. He indicated that Dr. Schmidt was behaving as a self-imposed moral and psychiatric authority instead of as a supervisor and that this resulted in excessive stress and eventual disability.

In a statement received by the Office on February 10, 1999, appellant asserted:

> "My duties as [a] computer specialist required the assimilation of new and extensive computer programming techniques/requirements in a very short amount of time as well as the subsequent processing of a very large archive of neurological data scans which were to be used in several research studies. Since

> there was a time constraint of job completion (as defined in my job definition upon hiring) completing the above duties often required long hours [more than 10] [a] day as well as work on the weekends, often accompanied by strict progress reporting and deadline requirements, which persisted through the entire course of employment.
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> "My day to day duties were required to be performed in a small computer lab/office no bigger than the size of a small bedroom with not only my supervisor present, but often one of two other individuals as well. Since most of my duties required intense mental concentration for hours on end, working with other individuals at close range (who were often on the [tele]phone, having meetings, etc.) was a source of continued emotional stress.
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> "Almost from day one there was a strained relationship between myself and Dr. Schmidt, which was not initiated [or] propogated by me. Accustomed to 'difficult bosses' in previous jobs as well as difficult work assignments, I did n[o]t think much about the seriousness of this situation and its ramifications on my long term health until after I resigned and first sought medical treatment in November 1995."

Appellant alleged that, Dr. Schmidt initiated debates and arguments, which became heated and personal, as appellant felt he was intruding into his personal life. Appellant alleged that these discussions occasionally ended with Dr. Schmidt asking him if he wanted to meet with him in a private office or suggesting that he seek psychological counseling.

Appellant alleged that he was warned by other employees that Dr. Schmidt behaved in an intrusive and "bizarre" manner and alleged that Dr. Schmidt made derogatory remarks about him to other employees. He attached a copy of a September 14, 1998 E-mail, from a fellow employee, Jennifer Shouton, who had allegedly informed him in March 1995 that Dr. Schmidt had told her he would "never last here."

Dr. Schmidt helped appellant obtain a loan by cosigning for a loan on January 27, 1995. Appellant stated that after working as a volunteer for two months, the employing establishment advised him that a full time, paying position could be created for him, but that this could not be arranged for several months. He stated that he needed financial assistance to tide him over until he was hired as a paid employee and he accepted Dr. Schmidt's offer to cosign for a loan. Appellant stated that although the loan temporarily allayed his financial concerns, it created a debtor/creditor relationship with his supervisor, which became a source of emotional stress. He alleged that Dr. Schmidt became anxious about his completing work assignments and that Dr. Schmidt put silent pressure on him to work longer hours to get things done faster. Appellant stated that Dr. Schmidt became especially distraught on one occasion when he was late on a monthly payment and expressed concern about his credit rating. He stated that Dr. Schmidt ultimately paid off the balance of the loan and would reminds appellant about his responsibility to repay the debt.

Appellant stated that his disabling emotional condition began to develop in approximately March 1995.[1] He experienced extreme mental and physical fatigue, insomnia, severe sweating, diarrhea and "flu-like" symptoms, all of which evolved into a permanent state of chronic fatigue and emotional distress.

In a statement received by the Office on December 10, 1998, Dr. Schmidt responded to appellant's allegations. He stated that although appellant worked in a small, cramped office shared by three or four other employees, including himself, these conditions were not unusual at the employing establishment. Dr. Schmidt stated that appellant objected more than most employees to the limited work space and lack of privacy and noted that efforts were made to accommodate appellant by getting permission for him to work at computers belonging to another section in the branch with more space and permitting him to work remotely from other terminals and at other computer labs in the clinical center. Dr. Schmidt stated:

> "While his temporary position provided an hourly wage, he was essentially treated as a salaried employee and was not rigidly held to an hourly schedule, rather to completing certain tasks and being available during daytime hours for reviewing work completed, setting out task lists, or consultation about computer-related issues. If [appellant] chose to complete tasks on weekends or evenings rather than core hours, he was free to do so.... The jobs [appellant] was asked to complete were comparable to those asked of other employees with his level of educational background (bachelor's degree) and job experience, although several people working at comparable jobs at [the employing establishment] had more formal computer training than [appellant].
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> "The deadlines [appellant] likely refers to were a part of his initial professional services contract, as drafting and approval of such contracts require specifying projects to be completed during the contract period. He was able to meet those deadlines well before the end of his contract period. During this employment in the temporary civil service position he was not required to meet deadlines *per se*, rather to fulfill the requirements of the position description, which was developed around recurring tasks and meeting standards in the quality of work performed."
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> "[Appellant] identifies the beginning of his difficulty as more or less simultaneous with his starting in the temporary civil service position. [He] had requested to continue working at the employing establishment after the expiration of his professional service contract on the same research projects he worked on as a contractor. [Appellant's] pay was approximately the same, with additional benefits associated with the civil service position. His work assignments did not change except that he was no longer required to meet contract deadlines and he would have been eligible to apply for a permanent position. [Appellant] did report difficulty sleeping and feeling anxious, which he attributed to difficulties with the physical work environment. He also felt that his relationship with me

[1] Appellant indicated that he had previously been treated for depression in 1989 and 1990.

> was a source of anxiety for reasons he had difficulty articulating, but some of which had to do with his feeling that his requirements for more privacy were not being met and I was exercising too much control over him. [Appellant] also described being extremely worried about his finances and income, due to very sizable education loans that were coming due, felt underpaid for his level of experience and duties and frequently petitioned for increases in his salary in an effort to meet his financial obligations. He became more insistent on being assigned to a private work area or to work from his home, in essence 'telecommuting.' Towards the end of his employment he voiced strong objections to the job including the feeling that his working for me was making him ill, that he was being paid too little and that he had developed strong philosophical objections to the type of clinical research we were conducting (including work on treating depression with medications and electroconvulsive therapy). In response, efforts were made to find [appellant] a less crowded work space away from me and simplify the tasks to which he was assigned. I suggested that he seek mental health help, however, at the time [he] rebuffed the recommendation, felt insulted, stated that he felt that I needed the help and that he categorically distrusted current medical approaches. He ultimately left [the employing establishment] against my recommendation.... I counseled him against resigning as his prospects for other jobs were very speculative and he was in dire financial straits due to educational loan debts. No formal personnel actions ... occurred, all actions were informal.…
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> "Significantly, while [appellant] was having difficulty at work, I discussed these difficulties with my supervisor, Dr. William Z. Potter, the chief of the section and an internationally recognized expert in bipolar mood disorders, the diagnosis for which [appellant] is now being treated. We speculated as to whether his difficulties could reflect an evolving or underlying serious mental illness and should be referred for treatment and were not simply personality attributes such as being excessively demanding or sensitive.… In retrospect, it now appears possible that some of [appellant's] excessive requests for privac[y] and sensitivity to perceived control or criticism were indications of either the early stages of bipolar mood disorder or of a risk for such a disorder."

By decision dated May 28, 1999, the Office found that fact of injury was not established, as the evidence of record did not establish that an emotional condition was sustained in the performance of duty.

By letter dated April 18, 2000, appellant requested reconsideration. He alleged that Dr. Schmidt regularly acted in an odd, confrontational and unprofessional manner and had an unusual breathing routine and made grunting noises when he worked, which disturbed appellant. Dr. Schmidt allegedly told Dr. Potter that he resented him for having hired appellant to work with him.

When appellant began working with the employing establishment in November 1994, there was no position description to delineate his duties; thus, his job duties were undefined. He had to compose the position description himself, which involved new and novel tasks for which

he had no prior training. Appellant felt this was typically an administrative duty and that the mere fact that he was forced to perform this task created excessive emotional stress.

The programs appellant was required to perform were designed for employees with greater educational background and experience. The computer system he was trained to use was very difficult to master for employees, like appellant, who were not computer science majors or did not take courses in computer science. Appellant believed that other employees working with the employing establishment with the same types of programming, research and analysis tasks had significantly more training in computer science and biomedical engineering. Although Dr. Schmidt noted in his response that appellant proved his ability to handle the position by completing a manual used by researchers at the employing establishment, appellant asserted that he was able to complete the manual in a timely manner only because he worked long hours and on weekends.

Appellant submitted an April 18, 2000 report from Dr. Rolf G. Jacob, Board-certified in psychiatry and neurology. He noted that appellant was previously treated for depression in 1989. Dr. Jacob stated:

> "[Appellant's] history indicates that at the time of employment he had a preexisting condition involving a vulnerability to depression or mental dysfunction (family history, psychiatric treatment as a child and treatment for depression as a young adult). Individuals predisposed for depression are likely to respond adversely to stressors well tolerated by individuals not so predisposed. From the history presented in (D) and [appellant's] condition.… I judge employment factors relating to his current condition to include:
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> > (1) Chronic stress and ongoing negative emotional reactions resulting from his fear of not being able to perform adequately his normal duties in the newly created position he was hired to work in, given his lack of formal training as well as the fact that there was no '[p]osition [d]escription.' Structuring his duties at the onset of his employment (especially during the first four month[s] of employment while he was a 'special volunteer' then 'Professional Services Contractor,' as well as thereafter, while he was a full-time employee.)
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> > (2) Negative emotional and physical reactions from working long hours in order to self-teach himself job-related duties in order to keep up with normal daily work requirements of the newly created position throughout the course of his employment.
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> > (3) Negative emotional and physical reactions to various conditions of employment including his supervisors described overly probing, intrusive and periodic confrontational behaviors, the supervisor making inappropriate remarks that he 'would not last too long at [the employing establishment],' the supervisor's perceived requirement that the [appellant] disclose personal information during informal 'therapy' with [his] supervisor's subsequent discussion [his] mental health with the

> [s]ection [c]hief, the perceived abusive/erroneous actions by management involving his being asked to prepare his own '[p]osition [d]escription' and his supervisor propagating a perceived generally antagonistic work environment on a day-to-day basis.
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> (4) In general, the deteriorating emotional and physical reaction of [appellant] related to the ongoing fear of not being able to perform normal job duties adequately, given the above noted work conditions and factors, a situation which ultimately caused him to have to resign.

"The above factors and work-related conditions have triggered, are related to and continue to maintain [appellant's] permanent current diagnosis of affective disorder."

* * *

"Fatigue, anxiety, nausea, sleeplessness and diarrhea limit appellant's current function."

Appellant also submitted an April 19, 2000 report from Dr. Robin B. Lake, Phd. He communicated with Dr. Lake through emails and telephone calls from 1994 through 1995 and provided him with a copy of his position description and resume. Dr. Lake concluded based on the information appellant submitted that there was a "mismatch" between appellant's job skills and his job requirements and that he was not prepared to handle the learning requirements and workload he encountered while working at the employing establishment.

By decision dated July 24, 2000, the Office found that appellant did not submit evidence sufficient to warrant modification of the May 28, 1999 Office decision.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.[2] There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[3]

The first issue to be addressed is whether appellant has established factors of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees'

[2] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

[3] *See Ruth C. Borden*, 43 ECAB 146 (1991).

Compensation Act.[4] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.[5]

The Board finds that appellant has failed to submit sufficient evidence to establish his allegations that his supervisor, Dr. Schmidt, engaged in a pattern of harassment. These included appellant's allegations that Dr. Schmidt "grunted" and engaged in "heavy breathing" because he intended to harass and intimidate him. Appellant alleged, in general terms, harassment from Dr. Schmidt, but has not provided a description of specific incidents or sufficient supporting evidence to substantiate the allegations.[6] He has not submitted any factual evidence to support his allegations that he was harassed, mistreated, or treated in a discriminatory manner by his supervisors. Appellant has failed to provide support for his allegations that Dr. Schmidt initiated inappropriate discussions about his personal life, that he harassed him by pressuring him into meeting to discuss his psychological condition and suggesting that he seek psychological counseling and that he made derogatory remarks about him to other employees. To that end, appellant failed to establish that Dr. Schmidt threatened or verbally abused him or ridiculed him as alleged. The Office properly found that the allegations made by appellant concerning the alleged derogatory remarks made about him by Dr. Schmidt, aside from the one instance cited in the 1998 email from his former coworker Jennifer Shouton, in which he allegedly said appellant "would n[o]t last too long at [the employing establishment]," were not established as factual by the weight of evidence of record. Regarding this email, the copy of the message which appellant submitted indicates that Ms. Shouton had difficulty remembering the alleged remark by Dr. Schmidt, or identifying the year in which he said it. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[7] Appellant has not shown how such an isolated comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[8]

Further, there is no evidence that Dr. Schmidt unduly pressured or harassed appellant at the workplace to repay the loan he cosigned or that he used his status as a creditor to exert control over him. Nor has appellant provided factual support for his allegations that his

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[4] *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Id.*

[6] *See Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.)

[7] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

[8] *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).

supervisors created a hostile work environment.[9] The alleged statements by Dr. Potter that appellant "was in the Army now" and that he "just had to deal with it' do not constitute harassment, but are merely generalized statements admonishing appellant to adhere to the standards of the employing establishment.

The Office reviewed appellant's allegations of harassment and abuse and found that they were not substantiated by the evidence of record. The Board finds that the episodes of harassment alleged by appellant are not established as he failed to provide sufficient evidence for his allegations. As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work, which do not support his claim for an emotional disability.[10] For this reason, the Office properly determined that these incidents constituted mere perceptions of appellant and were not factually established.

The Board further finds that the administrative and personnel actions taken by management in this case contained no evidence of the employing establishment's error or abuse, therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.[11]

Appellant has presented insufficient evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters on the part of the employing establishment. As to appellant's allegation that management overburdened him with an excessive workload and gave him unreasonable deadlines, appellant did not provide any evidence that the employing establishment acted in an abusive or unreasonable manner in setting performance guidelines for him. The employing establishment indicated that appellant was not restricted to a rigid schedule or timetable and was able to complete his work assignments by working beyond normal business hours at night or on weekends. Thus, these actions on the part of management did not constitute a factor of employment. With regard to appellant's allegation that he was forced to work in a small, crowded office without sufficient space, the Board finds that this amounts to frustration at not being permitted to work in a particular environment and is not a compensable factor under the circumstances of this case. Dr. Schmidt noted that such conditions were not uncommon at the employing establishment and that management attempted to accommodate appellant's concerns about a cramped workspace by periodically allowing him to telecommute and work in satellite offices.

The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.[12] However, appellant has not submitted evidence indicating that the employing establishment imposed an unusually heavy workload and

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[9] *Merriett J. Kauffmann*, 45 ECAB 696 (1994).

[10] *See Debbie J. Hobbs, supra* note 2.

[11] *See Alfred Arts, supra* note 8.

[12] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

unreasonable deadlines.[13] Regarding appellant's allegation that he developed stress due to the uncertainty of his job duties, the need to create his own position description[14] and his insecurity about maintaining his position, the Board has previously held that a claimant's job insecurity is not a compensable factor of employment under the Act.[15]

Appellant's allegation that he was forced to perform additional duties that were designed for employees with greater education and training and who were earning higher salaries for performing similar work was denied by the employing establishment and appellant has not substantiated that such incidents actually occurred.[16] The Board notes that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.[17] However, appellant has submitted no evidence indicating that the employing establishment committed error or abuse or that its actions in this instance were unreasonable.

Accordingly, a reaction to such factors did not constitute an injury arising within the performance of duty. The Office properly concluded that in the absence of the employing establishment error such personnel matters were not compensable factors of employment.

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[13] *Id*.

[14] In a rebuttal statement dated May 26, 2000, the employing establishment stated that it is common practice to ask employees to provide descriptions of their work, from which administrative staff would complete the actual description. The employing establishment further noted that appellant's work deadlines were limited to the period of his professional services contract which expired at the end of January 1995 and that the fact that he requested to continue working at the employing establishment at the end of his contract indicated that he considered himself qualified and able to perform the requirements of his position.

[15] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

[16] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative reliable evidence. *Ruthie M. Evans*, 41 ECAB 416 (1990).

[17] *Margreate Lublin*, 44 ECAB 945 (1993).

The decision of the Office of Workers' Compensation Programs dated July 24, 2000 is hereby affirmed.

Dated, Washington, DC
March 11, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member