

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH R. BOUDREAUX and DEPARTMENT OF THE ARMY,
CIVILIAN TRAINING DEVELOPMENT, Fort McClellan, AL

*Docket No. 01-2280; Submitted on the Record;
Issued January 6, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On October 27, 1998 appellant, then a 57-year-old training developer, filed a claim alleging that he developed an emotional condition due to stress at work. The Office denied appellant's claim on December 3, 1998, but thereafter reopened the claim for review on its merits.

Appellant alleged that the following employment factors caused or contributed to his condition: he claimed that he was denied "futuristic" training; that he was discriminated against on time-off awards; that he was never considered for promotion yet 21 of his peers were promoted; that he received two bogus counseling statements; that his supervisor refused to repair his lap-top computer; and that he was transferred to Fort Leonard Wood, Missouri, not later than April 1, 1999. Appellant further alleged that his supervisor discriminated against him, for which he filed an Equal Employment Opportunity (EEO) complaint, that he was overworked as his supervisor required him to perform the work of two and one half people, that he was tasked with make-work projects.

The employing establishment controverted appellant's claim. His supervisor, Mary Mitchell, provided a statement in which she explained that the use of a computer was not essential to appellant's ability to accomplish the agency mission, that the directorate had a full-time secretary and a word processing center to provide typing support, such that getting appellant a functioning computer was not a top priority and that the decision not to replace the computer was administrative. Ms. Mitchell also denied discriminating against him and noted that his workload was about one-fourth that of the load carried by other training specialists assigned to that division. She noted that the paperwork appellant submitted in support of his claim, that he was being overworked, was actually documentation produced to justify how much work could be accomplished if adequate funding were available to hire personnel to accomplish certain

prospective projects and was not documentation of the requirements of appellant's position. Regarding counseling, Ms. Mitchell stated that before appellant was counseled he was simply not reviewing lesson plans.

By decision dated September 28, 1999, the Office rejected appellant's claim finding that he had not established any compensable factors of employment in the development of his emotional condition. The Office found that appellant's denial of training was not compensable as it was administrative, that "time off" awards were a prerogative of management; that promotions were not compensable as they were administrative; that disciplinary matters were also not compensable as they were administrative; that Ms. Mitchell's denial of a new computer was an administrative decision and was not a requirement of his position; that his reaction to a transfer was self-generated; that the EEO complaint was not resolved in appellant's favor; and that he did not present any substantive evidence that he was overworked.

Appellant disagreed with the September 28, 1999 decision and he requested an oral hearing before an Office hearing representative.

A hearing was held on August 3, 2000 at which appellant testified. Appellant alleged that he could not afford to transfer; that his condition was caused by an enormous workload; that he was deliberately not considered for promotions; and that he had difficulty completing tasks because his access to a computer was restricted since his lap-top broke down. Appellant related that his job required the use of a computer, that he had had sleep apnea and major depression since 1998 and that he had to perform duties that no other training specialist had to perform.

By decision dated February 8, 2001, the hearing representative affirmed the September 28, 1999 decision. The hearing representative found that appellant failed to document his work overload, that his job description did not specify that he needed a computer to perform all of his work, that the evidence regarding lesson plans, internal memorandums, correspondence and environmental training data were all too general and were not specific to appellant's assigned duties and that his fear of being unsuccessful because of his broken computer and the amount of work was self-generated. The hearing representative found that none of appellant's allegations regarding administrative and personnel actions and issues presented evidence of administrative error or abuse and that, therefore, none of them were compensable.

On May 3, 2001 appellant requested reconsideration and submitted an April 12, 2001 statement in which he argued that the fact he settled his EEO complaint should prove that he was discriminated against. Appellant stated that he had three supervisors, which was very stressful, that he disagreed with Ms. Mitchell's statement that he did not need to have a computer to perform his job and that his employer erred by not replacing his laptop computer. He also submitted three statements from coworkers which discussed the fact that he used the Chemical School computer to perform work and that he did not have access to a computer at all times.

By decision dated June 8, 2001, the Office denied reconsideration finding that the evidence submitted was neither new nor relevant.

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

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.³

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁴ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of

¹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

² *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Id.*

⁴ *Donna Faye Cardwell*, *supra* note 2, *see also Lillian Cutler*, 28 ECAB 125 (1976).

the Act.⁵ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be “in the performance of duty.”⁶

When working conditions are alleged as factors in causing 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 When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁸ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.⁹ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant’s emotional condition, then the medical evidence of record need not be considered.

Many of appellant’s allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,¹⁰ the Board held that an employee’s emotional reaction to administrative actions or personnel matters taken by the employing establishment is generally not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment.¹¹ Absent evidence of such error or abuse, the resulting emotional condition is considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: being denied training,¹² being denied a “time off”

⁵ *Id.*

⁶ See *Joseph DeDonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁷ See *Barbara Bush*, 38 ECAB 710 (1987).

⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ See *Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹⁰ 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991).

¹¹ See *Richard J. Dube*, 42 ECAB 916 (1991).

¹² See *Ernest St. Pierre*, 51 ECAB 623 (2000).

award,¹³ being denied a promotion,¹⁴ two “bogus” counseling statements,¹⁵ supervisory refusal to repair or replace his laptop computer,¹⁶ his transfer to Fort Leonard Wood,¹⁷ and giving “make-work” assignments.¹⁸ Appellant has presented insufficient evidence to establish administrative error or abuse. Therefore, these allegations do not constitute compensable factors.

Appellant alleged that he developed an emotional condition arising due to supervisory harassment. The Board has held that actions of an employee’s supervisor, which the employee characterizes as harassment, may constitute factors of employment giving rise to coverage under the Act.¹⁹ However, in order for harassment to give rise to a compensable disability under the Act, there must be some evidence that such harassment did in fact occur. Mere perceptions of harassment alone are not compensable under the Act.²⁰ Appellant alleged that his EEO claim was proof of supervisory harassment. However, he presented evidence regarding the nature of the EEO settlement or any finding of the employing establishment harassment or discrimination. The Board finds that appellant has failed to submit sufficient, reliable evidence in support of his allegations that establishes harassment as alleged.²¹ Accordingly, the Board finds that his allegations do not constitute compensable factors of employment.

Appellant alleged that his emotional condition arose from the overwork to which he was subjected. The Board has held that overwork may be a compensable factor of employment,²² however, such overwork must be established on a factual basis by substantial and probative evidence.²³ In this case, appellant’s overwork allegations were disputed by his supervisor and by the employing establishment. His supervisor noted that appellant was performing about one fourth of the work that was being performed by other training specialists. Further, the paperwork submitted describing various tasks was not appellant’s specific job description, but employment tasking for projected funding.

Appellant has failed to submit sufficient evidence that he was subjected to harassment, discrimination or administrative error or abuse. He has failed to establish any compensable

¹³ See e.g. *John Polito*, 50 ECAB 347 (1999).

¹⁴ See *William Karl Hansen*, 49 ECAB 140 (1997).

¹⁵ See *Constance I. Galbreath*, 49 ECAB 401 (1998).

¹⁶ See e.g. *Christophe Jolicoeur*, 49 ECAB 553 (1998).

¹⁷ See *Ernest J. Malagrida*, 51 ECAB 287 (2000).

¹⁸ See *Janet D. Yates*, 49 ECAB 240 (1997).

¹⁹ *Sylvester Blaze*, 42 ECAB 654 (1991).

²⁰ *Ruthie M. Evans*, 41 ECAB 416 (1990).

²¹ See *Constance I. Galbreath*, *supra* note 15.

²² See *Robert Bartlett*, 51 ECAB 664 (2000).

²³ See *Sherry L. McFall*, 51 ECAB 436 (2000).

factor of his employment in the development of his emotional condition. Therefore, the denial of his emotional condition claim must be affirmed.

The Board further finds that the refusal of the Office to reopen appellant's case for further reconsideration did not constitute an abuse of discretion.

The Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

“(b) The application for reconsideration, including all supporting documents, must:

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
 - (i) Shows that [Office] erroneously applied or interpreted a specific point of law;
 - (ii) Advances a relevant legal argument not previously considered by [Office] or
 - (iii) Constitutes relevant and pertinent new evidence not previously considered by [Office].”²⁴

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²⁵ When a claimant fails to meet one of the above-mentioned standards, the Office of Workers' Compensation Programs will deny the application for reconsideration without reopening the case for review on the merits.²⁶

In support of his reconsideration request, appellant submitted several personal statements in which he claimed that he was overworked, harassed and discriminated against. These arguments had previously been made and considered by the Office. Therefore, his arguments do not constitute relevant and pertinent new evidence not previously considered. Appellant also submitted three coworker statements addressing a nonworking laptop computer. This issue was also previously raised and considered by the Office. Therefore, these statements do not constitute a basis for reopening appellant's claim for further review on its merits. Appellant failed to show that the Office erroneously applied or interpreted a specific point of law; he failed to advance a relevant legal argument not previously considered by the Office; and he failed to submit evidence which constituted relevant and pertinent new evidence not previously

²⁴ 20 C.F.R. § 10.606(b)(1), (2).

²⁵ 20 C.F.R. § 10.607(a).

²⁶ 20 C.F.R. § 10.608(b); see *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

considered by the Office. Therefore, the Office properly denied appellant's request for reconsideration.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 8 and June 8, 2001 are hereby affirmed.

Dated, Washington, DC
January 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member