United States Department of Labor
Employees' Compensation Appeals Board

TERRY NEWSOM, Appellant	)	
and	)	**Docket No. 06-226**
	)	**Issued: May 15, 2006**
DEPARTMENT OF THE ARMY, WHITE SANDS MISSLE RANGE, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 14, 2005 denying his emotional condition claim.[1] 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 an emotional condition in the performance of his federal duties.

FACTUAL HISTORY

On May 21, 2002 appellant, then a 55-year-old electronics engineer, filed an occupational disease claim alleging that his emotional condition was attributable to his federal employment.

[1] The Board notes that the record contains an October 6, 2005 decision in which the Office approved attorney's fees. However, the Board will not review this decision as it is not contested on appeal.

He first realized that his emotional condition was caused or aggravated by his employment on July 22, 1999. He stated that, although he wanted to continue working and that his doctors believed that he could work with proper accommodation, the management team wanted to terminate him. Appellant stopped work on September 7, 2001 and retired on disability effective February 21, 2002.

Appellant submitted a May 21, 2002 statement noting that he was diagnosed with recurrent major depression disorder, dysthymia and panic disorder, which his doctors attributed to his work environment and his supervisors at the employing establishment. His panic attacks started in the summer of 1998. He alleged that the instability caused by the employing establishment's downsizing, his frequent job changes and reassignments and the relocating of his office caused stress. He noted that a coworker had committed suicide and he and other coworkers met with an Employee Assistance Program representative to cope with the situation.

Appellant's degree is in Mechanical Engineering and he asserted that his job description was changed in 1993 to an Electronics Engineer. This change was stressful and alleged that he did not have sufficient training or experience for the position. Appellant asserted that he was moved so often due to reorganizations that it was detrimental to his work. He was required to provide excessive documentation about his job performance, which others were not required to do and was given impossible deadlines and demeaned by his supervisor, John Corriveau, and his team leader, Rick Denman. He alleged that, during a meeting, Mario Correa (then the division chief) leaned across the table and yelled repeatedly at him in front of his first-line supervisor, John Thomas, and a coworker, Darrin Loken. Appellant was removed from a project due to possible whistleblower actions and thereafter received no further meaningful work, professional travel or professional training.

He also cited the employing establishment's unwillingness to allow him to work from home. He alleged that John Jenson, a Director, stated that "you will never be given the opportunity to work at home.… I do n[o]t care what the doctors say." He stated that it took over a year for the employing establishment to grant his accommodation to work from home, which occurred at the end of August 1999. It took another four months for an agreement to be reached and that he signed the flexiplace agreement under duress. Appellant officially started his flexiplace work on September 7, 1999, but did not receive promised equipment for six months. He had to write detailed weekly reports, was given unreasonable deadlines and received calls from Tom Chavez, his supervisor, which required him to report to the employing establishment. He alleged that the accommodation agreement did not meet his doctors' requests. He further alleged that the assignments the employing establishment provided during his flexiplace were hard given his disability and his lack of familiarity with the Microsoft Word program. He asserted that Mr. Chavez had tried to terminate him before he even got his computer equipment set up.

By letter dated June 10, 2002, the Office advised appellant of the factual and medical information needed to establish his claim.

In an April 4, 2000 medical report, Dr. Harold E. Alexander, Jr., a Board-certified psychiatrist, diagnosed recurrent major depression, dysthymia and panic disorder. He noted that appellant's stressors included his daughter's ex-boyfriend and his problems with his work

environment. In a June 28, 2001 report, Dr. John G. Kutinac, a licensed psychologist, stated that appellant was treated since 1999 for major depression and anxiety. Dr. Kutinac noted that the employing establishment's work site was one of the major triggers of appellant's stress and recommended that appellant work from home.

In a June 28, 2002 letter, Elizabeth Ybarra, Director of Workforce Operations, acknowledged that the employing establishment was affected by downsizing, reassignments and realignments as were other agencies. She stated that Mr. Jensen denied making statements about appellant not being given an opportunity to work at home and noted that appellant's statements were untrue or taken out of context. Ms. Ybarra stated that the Equal Employment Opportunity (EEO) office, the Civilian Personnel Advisory Center and Dr. Noel Habib, an employing establishment physician, worked with appellant and his physician to effect a formal flexiplace agreement. The flexiplace agreement took time to accomplish due to regulatory requirements, leave issues and coordinating between the various parties. She noted that appellant was allowed to work at home while the formal flexiplace agreement was being drafted. Appellant was given GS-11 work and not the GS-13 level to which he was permanently assigned, as there was no GS-13 work that could be performed from home. She stated that work at the GS-11 level did not affect appellant's permanent grade or pay rate and that he was on flexiplace for about three years until he voluntarily retired. She noted that, prior to and during the flexiplace/accommodation period, appellant was often unavailable and took considerable leave. After an evaluation revealed that appellant could not perform work of any tangible value, his termination was proposed but was later cancelled to give him an opportunity to perform under a Performance Improvement Plan (PIP). During the PIP, appellant consulted with a retirement counselor and went on sick leave September 17, 2001, approximately two and a half months after the receipt of the PIP. He never returned to duty and his disability retirement was effective February 21, 2002. The employing establishment denied appellant's other allegations and provided statements from appellant's supervisors disputing his allegations.

Appellant submitted additional medical reports from Dr. Alexander and Dr. Kutinac.

In a December 11, 2002 decision, the Office denied appellant's claim finding that he failed to establish any compensable employment factors. The Office noted that appellant had only provided allegations and general statements of multiple administrative actions over the years.

In a letter dated December 4, 2003, appellant requested reconsideration. He repeated his allegations concerning staffing shortages, restructuring and realignments at the employing establishment and that his change from a mechanical engineer to an electronics engineer profoundly impacted him as he was not trained or educated to perform such duties.

In a letter dated June 16, 2004, Sally Smoot, an employing establishment personnel chief, denied that appellant was overworked, that there were staffing shortages which affected his workload or that extra demands were placed on him. She disputed appellant's assertion that downsizing caused him to be overworked and advised that there was no evidence that any downsizing which took place caused appellant to be overworked or unable to cope with the demands of the job. Appellant underwent a change in title and series during the period from 1987 through 2002, which was on July 26, 1993. Ms. Smoot noted that appellant remained in

the electronics engineer position until he retired. With respect to appellant's allegation that he was not qualified to perform the position of electronics engineer, Ms. Smoot stated that the Civilian Personnel Office had determined that he was qualified for the position and possessed the knowledge, skills and abilities to do the work. She advised that appellant had successfully performed the duties of an electronics engineer prior to 1998. As to appellant's allegation of training, Ms. Smoot stated that his training records were not available as he fell out of the automated system once he retired.

By decision dated July 26, 2004, the Office denied modification of the December 11, 2002 decision. The Office found that appellant failed to show any error or abuse with respect to the employing establishment's administrative actions.

On July 20, 2005 appellant requested reconsideration. He alleged that the employing establishment possessed medical and psychological records that demonstrated problems as early as 1987. Appellant asserted that he was continually exposed to adverse factors of his employment until his retirement in February 2002. He asserted that the employing establishment did not act reasonably and failed to provide reasonable accommodations. Appellant argued that the PIP was an "acknowledgment" that he was in fact performing assigned duties at a higher grade level than he was capable of performing and that learning new formats for working was unreasonable and caused stress. He asserted that it was unreasonable for Mr. Chavez to request that he turn in work and report to the employing establishment after medical reports were submitted. Additional factual and medical evidence were received.

By decision dated September 14, 2005, the Office found that appellant's allegation of overwork was not established.

LEGAL PRECEDENT

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.[2] 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.[3]

A claimant 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *see also Lillian Cutler*, 28 ECAB 125 (1976).

adversely affected by employment factors.[4] 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.[5]

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.[6] 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.[7]

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act.[8] However, to the extent that the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[9]

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of certain employment incidents and conditions. The Office found that he did not establish any of these alleged incidents as compensable factors of employment. The Board must, thus, initially review whether the alleged incidents and conditions of employment are compensable under the Act.

Appellant attributed his condition, in part, to harassment by his supervisors. He alleged being yelled at by Mr. Correa in front of Mr. Loken and Mr. Thomas. He alleged that Mr. Jenson had stated that "you will never be given the opportunity to work at home…. I do n[o]t care what the doctors say." 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.[10] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable

[4] *Lori A. Facey*, 55 ECAB _____ (Docket No. 03-2015, issued January 6, 2004). *See also Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[6] *See Lori A. Facey*, *supra* note 4; *see also Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[7] *Id.*

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

[9] *Roger Williams*, 52 ECAB 468 (2001).

[10] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

under the Act.[11] In the present case, the employing establishment denied that these situations had occurred and submitted statements from the alleged parties involved, who specifically denied appellant's allegations. Appellant provided no corroborating evidence, such as witness statements, to establish that the alleged statements were made or that the actions occurred as he described.[12] The Board finds that appellant has not established a compensable factor under the Act with respect to the claimed abuse on the part of his supervisors.

Appellant has also attributed his condition to downsizing, frequent job changes, reassignments, new duties, different supervisors since 1977, a coworker committing suicide, being removed from a project due to possible whistleblower actions and relocating his office. The employing establishment reported that there was no evidence to support that appellant was removed from a project due to possible whistleblower actions and appellant has not submitted sufficient evidence to establish that this incident occurred as alleged. The employing establishment acknowledged that realignments had occurred over the years, but stated that the restructuring process did not affect appellant. The employing establishment further stated that its records showed that appellant had only one job change, which was on July 26, 1993 for the position of electronics engineer. Appellant has not submitted any evidence to contradict the employing establishment's records. To the extent that appellant is alleging stress caused by the employing establishment's downsizing/restructuring process, having to relocate his office and knowing a coworker who committed suicide, 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.[13] The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.[14]

Appellant has alleged that the restructuring process and staffing shortages caused him to be overworked and unable to cope. The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable and include such employment factors such as an unusually heavy workload and imposition of unreasonable deadlines.[15] The employing establishment denied the claim that appellant was overworked or that there were staffing shortages or downsizing which affected his workload. In the present case, appellant made only a general reference to being overworked but failed to submit any evidence that his workload had, in fact, increased during the restructuring process and staffing shortages or that

[11] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *David W. Shirey*, *supra* note 10. Furthermore, to the extent that appellant is alleging a verbal altercation, the Board has held that not every statement uttered in the workplace will give rise to coverage under the Act and a raised voice in the course of a conversation does not in itself warrant a finding of verbal abuse. *See Karen K. Levene*, 54 ECAB 671, 673 (2003).

[12] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[13] *See Cyndia R. Harrill*, 55 ECAB ___ (Docket No. 04-399, issued May 7, 2004); *Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[14] *See Cyndia R. Harrill*, *supra* note 13; *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

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

specific duties he performed caused his claimed condition. For this reason, the Board finds that he has not established a compensable factor under the principles of *Lillian Cutler*.[16]

Appellant attributed his condition, in part, to feelings of anxiety over not being able to perform the requirements of his position of electronics engineer because he was not trained, prepared, of educated to perform the duties of an electronics engineer. The provision or denial of training is a personal matter not considered to be within the performance of duty absent error or abuse.[17] Appellant, however, does not allege that his emotional condition was due to frustration over being denied training, but to the feelings of anxiety over not being able to perform his assigned duties as an electronics engineer. The employing establishment stated that appellant possessed the knowledge, skills and abilities to perform the position of electronics engineer and that he performed successfully in such position prior to 1988. Also, as noted above, appellant has not sufficiently identified specific tasks in his regular duties that he found stressful. He has thus failed to establish a compensable factor of employment in this respect.

Appellant alleged stress caused by the process of attaining a flexiplace agreement and his working conditions under such accommodation. However, appellant's reaction to such conditions must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.[18] He additionally alleged that, during the time he was on flexiplace, the employing establishment improperly assigned work duties, unreasonably monitored his activities at work such as instructing him to fill out multiple reports and having him report to the employing establishment and learning new formats for working and recommending that he be terminated. The handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of activities at work are administrative functions of the employer and are not compensable absent evidence of error or abuse.[19] In this case, appellant has not submitted sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Thus, appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

He also alleged that he was made to work outside of his restrictions while under flexiplace by having to do the above-described work. The Board has held that being made to work beyond one's physical limitations or prescribed restrictions may be a compensable factor of employment.[20] However, the employing establishment stated that appellant's physicians were involved in the effectuation of the formal flexiplace agreement. They further stated that appellant was only given work at the GS-11 level and not the GS-13 level, to which he was permanently assigned as there was no GS-13 level work available. The evidence further reflects that the medication appellant was taking rendered him unable to complete his duties and assignments and the employing

[16] *Lillian Cutler*, *supra* note 3.

[17] *Brian H. Derrick*, 51 ECAB 417 (2000).

[18] *See Cyndia R. Harrill*, *supra* note 13; *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

[19] *See Janet I. Jones*, 47 ECAB 345 (1996); *Richard J. Dube*, 42 ECAB 916 (1991).

[20] *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

establishment placed him on a PIP. Appellant then elected disability retirement. Given these circumstances, where the evidence shows that he was assigned work below his grade level and that his physician helped formulate his flexiplace assignment, the Board finds that appellant has not established a compensable factor of employment on this issue.

For the foregoing reasons, the Board finds that appellant has not established any compensable employment factors.[21]

On appeal, appellant's attorney argued that his case was reviewed under the wrong standard of review in the September 14, 2005 decision as that decision was not a merit decision. The Board notes, however, that the Office conducted a merit review in the September 14, 2005 decision. Any inaccuracy by the claims examiner regarding the appropriate standard for review was harmless error as the context of the September 14, 2005 decision clearly establishes that appellant was afforded a merit review.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 15, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[21] As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment as the cause of his emotional condition, the medical evidence relating appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).