United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 07-530**
	)	**Issued: July 9, 2007**
DEPARTMENT OF THE AIR FORCE, WARNER ROBINS AIR LOGISTICS CENTER, WARNER ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2006 appellant filed a timely appeal of a September 15, 2006 decision of a hearing representative of the Office of Workers' Compensation Programs that affirmed the denial of his emotional condition claim and a March 9, 2006 decision denying his request for a subpoena. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office abused its discretion in denying his request for a subpoena.

FACTUAL HISTORY

On January 24, 2005 appellant, then a 56-year-old supervisor, filed an occupational disease claim alleging that he developed stress and anxiety due to factors of his federal

employment. He indicated that he feared future reprisals and was unable to focus on his job. Appellant related that the driving factor in his claim was the employing establishment's failure to consider his disabling medical condition in a forced reassignment to Washington, D.C. Contributing factors included the alleged reprisal actions, failure to properly conduct requested investigations and failure to provide responses to valid employee requests.

On February 11, 2005 the Office informed appellant that the information submitted was insufficient to establish his claim. It requested a detailed description of the conditions or incidents he believed caused or contributed to his illness. The Office advised him to submit a medical report providing a diagnosis and an opinion with an explanation as to how incidents of federal employment contributed to the condition.

Appellant submitted medical reports from Dr. Samir Parekh, a Board-certified internist. On August 16, 2004 Dr. Parekh stated that appellant was undergoing treatments equivalent to chemotherapy for a serious, chronic medical condition. He opined that, given the demands of a new job and additional stressors and time demands that would be encountered, the proposed relocation to Washington, D.C., would be counter-productive to appellant's overall physical and mental well-being. Dr. Parekh advised against the move, "if possible." On December 14, 2004 he expressed concern as to how appellant would cope with the loss of a strong family support system, were he to relocate out of the area. Dr. Parekh stated that, if appellant was forced to stop treatment for his chronic condition due to side effects, the only alternative would be a liver transplant. He opined that relocation was not in appellant's best interests. On January 7, 2005 Dr. Parekh stated that appellant was unable to work from December 12, 2004 through January 9, 2005 due to treatment for a chronic liver condition. On January 21, 2005 he stated that appellant was on sick leave until further notice. In a report dated January 26, 2005, Dr. Parekh indicated that appellant's current physical and medical condition had deteriorated to the point that he was unable to work. He opined that appellant's recent move and demands of his new job had compounded his stress and anxiety, stating that "the added stress and move away from his support systems, both family and medical support; a new job; adjustment to a new city; frustration with feeling too ill to work; and treatment side effects of anxiety in a new situation have been extremely difficult for [appellant]."

Appellant also submitted reports from Dr. Sanjay M. Sharma, a Board-certified psychiatrist. On January 20, 2005 Dr. Sharma recommended that appellant be permitted to remain in the Atlanta area, where he would be able to have close follow-up to monitor his mental, psychological and emotional state, as well as his chronic hepatitis. On March 29, 2005 he diagnosed anxiety disorder and stated that he supported an indefinite leave of absence. In a report dated April 8, 2005, Dr. Richard B. Ellis, a Board-certified psychiatrist, opined that appellant was disabled from work due to anxiety comparable to post-traumatic stress disorder. He stated that appellant's condition was directly related to being reassigned to a position that removed him from trusted medical treatment and a social support group. Dr. Ellis opined that appellant could not continue treatment in Washington, D.C., despite its superb medical facilities, because he was frightened by the prospect of the move. Additionally, appellant would either have to uproot his teenage children and deal with their resistance to the move, or leave his family in Atlanta, depriving him of a support group. Dr. Ellis stated that appellant's response to this situation was anxiety.

On March 2, 2005 appellant stated that the specific agency action that caused his psychological illness, stress and anxiety was the forced move which was in direct opposition to his doctor's medical advice and was inconsistent with previous employing establishment accommodations for his disabling condition. He contended that the transfer showed a complete lack of concern for his health and created a level of stress that precluded him from working. Appellant also contended that the past actions of the employing establishment proved that his request to remain in his current location was reasonable. In 2001, the employing establishment had reversed a decision to relocate him after considering his disabling liver condition. Appellant identified other actions at the employing establishment which contributed to his stress and anxiety, including: "false and libel" documentation about his performance by Major General Collings on August 2, 2004; Major General Collings calling him a liar, escorting him from his office and stating that he could "make things ugly" on July 14, 2004; General Martin advising him to look for another assignment on August 2, 2004; Major General Collings providing untruthful information on August 6, 2004 stating that the employing establishment's request that he volunteer to move was not an act of reprisal but had been planned for some time; failure of Major General Collings to comply with personnel policy and regulations; disparate and inappropriate treatment by Brigadier General Morrill; failure of the employing establishment to adequately assess discrimination due to his medical disability; age and disability discrimination by Brigadier General Morrill; and denial of leave in spite of sufficient medical justification.

Appellant submitted a chronological history of events from 1994, when he was initially diagnosed with chronic hepatitis, through January 2005, when he asked the employing establishment to reconsider his forced relocation. He reiterated that in February 2001 the employing establishment had reconsidered its proposal to relocate him to Ohio in light of his disabling condition, and had accommodated him by cancelling the transfer. From January through September 2004, the employing establishment failed to investigate inappropriate management actions. He contended that the employing establishment's September 23, 2004 decision to relocate him to Washington, D.C., was a direct result of, and in retaliation for, his August 26, 2004 action filed with the employing establishment complaining about prohibited personnel actions. In a September 25, 2004 letter to General Martin, appellant requested reconsideration of his reassignment based on his medical condition. He stated that his family would not be able to accompany him on the move; that his medical support was located in Atlanta; and that he needed full family leave to support his mother in an assisted living facility.

In an undated supplement to his Form CA-2, appellant alleged reprisal, verbal abuse, discrimination through encouragement to retire, inappropriate and libelous documentation and attempts to misrepresent the issues in this case. On February 15, 2005 he stated that in 2004 he began challenging the inappropriate behavior of Major General Collings, who called him a liar on numerous occasions and said he "could make things ugly." On August 2, 2004 General Martin sent appellant an email recommending that, if he could not get along with his commander, he might want to look for reassignment. On August 6, 2004 appellant stated that he was asked to "volunteer" to move to Washington, D.C. and was given incorrect information by Major General Collings. On August 26, 2004 he filed an inspector general complaint alleging reprisal. On September 23, 2004 appellant was informed of a decision to relocate him to Washington, D.C., with an effective date of December 12, 2004.

The employing establishment controverted appellant's claim. In an undated attachment to the supervisor's report, it stated that his reassignment to Washington, D.C., was proper, and that his request was fully reviewed by the entire chain of command in light of his medical condition. The employing establishment noted that, as a member of the senior executive service (SES), appellant was subject to reassignment outside of his commuting area upon 60 days' written notice, pursuant to 5 U.S.C. § 3395(a)(2)(B), and that Congress intended the SES to be a mobile corps of managers who could be expeditiously reassigned to meet shifting agency priorities.

The record contains correspondence from the employing establishment to appellant regarding his request to cancel the reassignment to Washington, D.C. On November 23, 2004 Lieutenant General Richard Reynolds indicated that no compelling rationale had been found to cancel the reassignment and stated that his failure to accept the position would be considered a declination, making him subject to removal. On November 29, 2004 Lieutenant General Reynolds noted that the Secretary had considered all of the documentation that appellant had provided pertaining to his medical condition and thanked him for accepting the position. Appellant submitted numerous letters asking the employing establishment to explain its rationale for moving him in light of his medical condition.

In email correspondence between appellant and Brigadier General Morrill on December 19 and 20, 2004, appellant complained that he had not received adequate information regarding sick leave and restoration of annual leave, and requested a review of the decision to relocate him. He stated that he would be medically impacted by the proposed move to Washington, D.C., and requested sick leave due to chemo-like treatments and stress until his report date. Brigadier General Morrill informed appellant that full documentation was required in support of sick leave requests. Appellant inquired as to what additional information was necessary in order to satisfy his sick leave requests. On January 7, 2005 Brigadier General Morrill submitted an 11-page email response to 28 questions posed by appellant relating to general sick leave and annual leave policies, as well as specific questions relating to his own sick leave requests. In emails dated January 14 and 19, 2005 to Lieutenant General Donald Wetekan, appellant stated that he planned to file a grievance against Brigadier General Morrill for disparate treatment; communicating with him in a demeaning manner; implying that he was insubordinate; failing to provide accurate information; and suggesting that he seek medical retirement. In correspondence dated January 29 through February 1, 2005 between appellant and Major Kirkpatrick, appellant stated that his belief that his relocation was an act of reprisal.

Appellant complained to the employing establishment about perceived disparate treatment. On January 26, 2005 he stated that Brigadier General Morrill treated him differently than other employees by refusing to answer his questions, giving him inaccurate answers, stating that he was insubordinate and disapproving of his attire. On that same date, appellant alleged that the employing establishment's failure to attempt to resolve his grievance added to his stress.

The record reflects that appellant filed grievances, inspector general complaints, Equal Employment Opportunity (EEO) complaints, and an appeal with the Merit Systems Protection Board (MSPB), alleging disparate treatment on the part of his supervisors at the employing establishment. He reiterated his contentions that it had failed to conduct fair investigations regarding prohibited personnel actions, and had reassigned him to Washington, D.C., as a

retaliatory measure. In a May 10, 2005 settlement agreement between appellant and the employing establishment, appellant agreed to withdraw all pending complaints. However, he did not waive his right to compensation under the Federal Employees' Compensation Act.

By decision dated August 2, 2005, the Office denied appellant's claim on the grounds that he failed to establish a compensable factor of employment. The Office found that appellant's relocation was an administrative act and that appellant had not established error or abuse on the part of the employing establishment in directing his relocation to Washington, D.C.

On August 9, 2005 appellant requested an oral hearing. By letter dated August 9, 2005, he requested a subpoena for all internal employing establishment correspondence and documents addressing his reassignment to Washington, D.C. By decision dated March 9, 2006, the Branch of Hearings and Review denied his subpoena request on the grounds that he failed to explain how the documents requested would demonstrate that the employing establishment's activities caused his injury. The Office further indicated that appellant failed to explain why the information requested could not be obtained through the Freedom of Information Act.

In an undated statement entitled "dual standards," appellant reiterated allegations of agency wrongdoing and abuse of authority. He alleged that senior managers had given certain individuals unfair competitive advantage without proper investigation while, at the same time, unfairly disciplining other employees. Appellant submitted a memorandum entitled "Allegations of Reprisal and Extension of Whistleblower Protection under 10 U.S.C. § 1034." He alleged that following his challenge of a performance award and the application of dual standards to selected management, Major General Goings and Steve Davis initiated action for his reassignment that was detrimental to his health.

At the oral hearing, held on March 21, 2006, appellant stated his reasons for requesting a subpoena for documents relating to his reassignment. He explained that he "knew that [the employing establishment] would not provide the information under the Freedom of Information Federal Employees' Compensation Act," because it had objected to providing documents pursuant to discovery in his MSPB case on the grounds of attorney-client privilege. Appellant submitted documents relating to his MSPB case, including the May 10, 2005 settlement agreement; emails from him to the employing establishment expressing disappointment over his annual review; and a September 29, 2004 memorandum from him, referencing a timeline for a job announcement.

By decision dated September 15, 2006, the Office hearing representative affirmed the denial of appellant's claim, finding that he had failed to establish any compensable factors of employment. Finding that the decision to reassign appellant was administrative in nature, the hearing representative noted that the employing establishment had not committed error or abuse, but rather had acted reasonably under the circumstances.

LEGAL PRECEDENT -- ISSUE 1

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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act. 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.[1]

Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Federal Employees' Compensation Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.[2] Assignment of work is an administrative function of the employer,[3] as is an investigation by the employing establishment.[4]

Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[5] The fact that a claimant has established compensable factors of employment does not establish entitlement to compensation. The employee must also submit rationalized medical opinion evidence establishing that he or she has an emotional condition that is causally related to the compensable employment factor.[6] The opinion of the physician must be based on a complete factual and medical background, 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 compensable employment factors identified by appellant.[7]

ANALYSIS -- ISSUE 1

Appellant has not attributed his emotional condition to the performance of his regular duties or to any special work requirement arising from his employment duties under *Cutler*, nor has he implicated his workload as having caused or contributed to his emotional condition. Appellant contended that his assignment to Washington, D.C., constituted error and abuse on the part of his superiors and was thus compensable. However, the Board has consistently held that

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

[2] *Michael Thomas Plante*, 44 ECAB 510 (1993).

[3] *James W. Griffin*, 45 ECAB 774 (1994).

[4] *Jimmy B. Copeland*, 43 ECAB 339 (1991).

[5] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

[6] *James W. Griffin, supra* note 3.

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

frustration from not being permitted to work in a particular work environment is not a compensable factor under the Federal Employees' Compensation Act.[8]

The Board finds that appellant's allegation that the employing establishment improperly directed his transfer to Washington, D.C., relates to administrative or personnel matters, unrelated to his regular or specially assigned work duties, and does not fall within the coverage of the Federal Employees' Compensation Act.[9] Although the handling of disciplinary actions and leave requests, the assignment of work duties and the monitoring of work activities are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[10] 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.[11] In this case, appellant has not submitted sufficient evidence to establish that his superiors committed error or abuse with respect to this matter. On the contrary, the evidence presented establishes that the managers acted reasonably under the circumstances in effecting his transfer.

Appellant contends that the forced move to Washington, D.C., was inconsistent with previous employing establishment accommodations for his disabling condition, which proved that his request to remain in the Atlanta area was reasonable. He contended that the transfer showed complete lack of concern for his health and created a level of stress that has precluded him from working. However, the evidence shows that the employing establishment consistently considered appellant's chronic liver condition. In February 2001, it proposed to relocate appellant to Ohio, but this matter was reconsidered in light of his medical condition and he was permitted to remain in the Atlanta area. The employing establishment controverted appellant's claim, asserting that his request to remain in Atlanta had been fully reviewed by the entire chain of command in light of his medical condition. On November 23, 2004 the employing establishment stated that it had considered all of the documentation provided by appellant, but had found no compelling reason to cancel his reassignment. Appellant claimed that, by forcing him to move to Washington, D.C., the employing establishment would be removing him from his medical and family support systems, in that his family would not accompany him and he did not want to make a change in his medical treatment. However, the evidence does not reflect that appellant's family was unable to accompany him, but rather indicates that his children wanted to remain in Atlanta to finish school. There is also no indication that medical care was unavailable in Washington, D.C. In fact, appellant's physician, Dr. Ellis, acknowledged that Washington, D.C., had superb medical facilities, but opined that appellant could not continue treatment there because he was frightened by the prospect of the move. Appellant's reaction to the proposed

[8] *See Cyndia R. Harrill*, 55 ECAB 522 (2004).

[9] *See Lori A. Facey*, 55 ECAB 217 (2004). *See also Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[10] *Id.*

[11] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

reassignment constitutes a fear of future injury, which is not compensable under the Federal Employees' Compensation Act.[12] The Board also notes that, as a member of the SES, appellant was subject to reassignment outside of his commuting area upon 60 days' written notice, pursuant to 5 U.S.C. § 3395(a)(2)(B), and that Congress intended the SES to be a mobile corps of managers who may be expeditiously reassigned to meet shifting agency priorities.

Appellant stated that the forced transfer was unreasonable in that it was in direct opposition to his doctor's medical advice. However, the medical evidence of record does not support his contention. Dr. Parekh opined that, given the demands of a new job and additional stressors and time demands that would be encountered, the proposed relocation to Washington, D.C., would be counter-productive to appellant's overall physical and mental well-being and advised against the move, "if possible." He expressed concern as to how appellant would cope with the loss of a strong family support system, were he to relocate out of the area. The concerns expressed by Dr. Parekh relate to appellant's frustration from not being permitted to work in a particular work environment, which is not a compensable factor under the Federal Employees' Compensation Act.[13] Moreover, Dr. Parekh's recommendation that the move should be reconsidered "if possible" is equivocal in nature.

Appellant's allegations that the employing establishment improperly denied his leave requests despite sufficient medical justification, and failed to properly conduct requested investigations, to provide responses to valid employee requests, or to adequately assess discrimination due to his medical condition, also relate to administrative matters. The record reflects that, in response to his numerous letters and emails, the employing establishment provided responses explaining in detail the reasons for its actions. Appellant has not demonstrated that the employing establishment committed error or abuse with regard to these managerial functions, and his dislike of or disagreement with the actions is not a compensable factor of employment. The Board finds that he has not established a compensable employment factor under the Federal Employees' Compensation Act with respect to these administrative matters.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[14] However, for harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Federal Employees' Compensation Act.[15] In the present case, appellant has not submitted

[12] *Virginia Dorsett*, 50 ECAB 478, 482 (1999).

[13] *See Cydia R. Harrill*, *supra* note 8.

[14] *See Lori A. Facey*, *supra* note 9. *See also David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[15] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

sufficient evidence to establish his claim.[16] He alleged that he was treated in a demeaning manner due to poor management skills. Appellant contended that his forced relocation was a reprisal for his claims against the employing establishment. He alleged that Brigadier General Morrill discriminated against him on the basis of his age and his disability, and encouraged him to retire; that Major General Collings provided "false and libel" documentation about his performance, and untruthful information on August 6, 2004 when he stated that the employing establishment's request that he volunteer to move was not an act of reprisal but had been planned for some time; that General Martin advised him to look for another assignment on August 2, 2004; and that he was told that, if he could not get along with his commander, he may want to look for reassignment. His allegations alone are insufficient to establish a factual basis for his claim.[17] Appellant provided insufficient evidence, such as witness statements, to substantiate his claims. General allegations that appellant was treated unfairly and disrespectfully by management are insufficient to establish that harassment or discrimination did, in fact, occur. Thus, the Board finds that appellant has not established a compensable employment factor under the Federal Employees' Compensation Act with respect to these above-described allegations.

The record reflects that appellant filed grievances, inspector general complaints, EEO complaints and an appeal with the MSPB. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[18] Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact-finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO Commission standards. Rather, the issue is whether the claimant, under the Federal Employees' Compensation Act, has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[19] Appellant has failed to do so in this case.

Appellant alleged that Major General Collings verbally abused him by calling him a liar and saying that he could "make things ugly." The Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Federal Employees' Compensation Act.[20] The Board notes initially that appellant did not provide any evidence to corroborate that the alleged statements were actually made. As alleged, the Board finds that these statements do not constitute verbal abuse or harassment. While the statements may have engendered offensive feelings, they did not sufficiently affect the conditions of employment to constitute a compensable factor.[21]

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[16] *See Joel Parker, Sr., supra* note 5 (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[17] *Charles E. McAndrews*, 55 ECAB 711 (2004).

[18] *James E. Norris*, 52 ECAB 93 (2000). *See also Parley A. Clement*, 48 ECAB 302 (1997).

[19] *See James E. Norris, supra* note 18. *See also Michael Ewanichak*, 48 ECAB 354 (1997).

[20] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey, supra* note 14.

[21] *See Denis M. Dupor*, 51 ECAB 482, 486 (2000).

Appellant reported that he felt lost and betrayed by his supervisors' harassment. However, under the circumstances of this case, the Board finds that appellant's emotional reaction must be considered self-generated, in that it resulted from his perceptions regarding his supervisors' actions.[22]

For the foregoing reasons, appellant has not established any compensable employment factors under the Federal Employees' Compensation Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[23]

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[24] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case, and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[25] Section 10.619(a)(l) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[26] The Office hearing representative retains discretion on whether to issue a subpoena.

The function of the Board on appeal is to determine whether there has been an abuse of discretion.[27] Abuse of discretion is generally shown through proof of manifest error, a clearly

[22] *See David S. Lee*, 56 ECAB ___ (Docket No. 04-2133, issued June 20, 2005).

[23] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[24] 5 U.S.C. § 8126.

[25] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[26] 20 C.F.R. § 10.619(a)(l).

[27] *See Gregorio E. Conde*, *supra* note 25.

unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.[28]

ANALYSIS -- ISSUE 2

On March 9, 2006 the Branch of Hearings and Review denied appellant's request for a subpoena on the grounds that he failed to explain how the documents requested would demonstrate that the employing establishment's activities caused his injury. The Office further indicated that appellant failed to explain why the information requested could not be obtained through the Freedom of Information Act. Appellant testified at the oral hearing that he "knew that [the employing establishment] would not provide the information under the Freedom of Information Act" because it had objected to providing documents pursuant to discovery in his MSPB case on the grounds of attorney-client privilege. However, this reasoning is insufficient to establish that the documents could not be obtained through the Freedom of Information Act.

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts and similar criteria. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[29]

The Board finds no abuse of discretion in the Office hearing representative's denial of appellant's request for subpoenas. The Board will affirm the hearing representative's March 9, 2006 decision on this issue.

CONCLUSION

The Board finds that appellant has failed to establish a compensable factor of employment. The Board further finds that the Office did not abuse its discretion in denying appellant's request for a subpoena.

[28] *Claudio Vazquez*, 52 ECAB 496 (2001); *Martha A. McConnell*, 50 ECAB 128 (1998).

[29] *Dorothy Bernard*, 37 ECAB 124 (1985).

ORDER

IT IS HEREBY ORDERED THAT the September 15 and March 9, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 9, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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