

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

<p><b>H.C., Appellant</b></p> <p><b>and</b></p> <p><b>DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Tampa, FL, Employer</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Docket No. 07-2009</b></p> <p><b>Issued: January 16, 2008</b></p>
---	---	---

---

*Appearances:*  
*Appellant, pro se*  
*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 July 26, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 15 and July 11, 2007 merit decisions denying his emotional condition claim. 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 met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

**FACTUAL HISTORY**

On August 11, 2006 appellant, then a 66-year-old dental laboratory technician, filed a claim alleging that he sustained stress-related anxiety due to "harassment and intimidation" at work.<sup>1</sup> He stopped work on July 10, 2006. Appellant submitted a July 7, 2006 report in which

---

<sup>1</sup> Appellant suggested that this anxiety aggravated his preexisting cardiac condition.

Dr. Lawrence D. Kelly, an attending Board-certified family practitioner, indicated that he suffered from severe anxiety.

In several statements dated in July and September 2006, appellant alleged that in the first half of 2006 he was subjected to harassment and discrimination by Dr. David Christian and Dr. Gary Fort, supervisors, and Rosa Vincent, a coworker. He indicated that in December 2005 or January 2006 he spoke with Dr. Christian about tooth crowns that were rendered unusable and asserted that Dr. Christian did not speak to him for “many weeks” thereafter. Appellant claimed that during this period there were several incidents of infection control violations by Dr. Christian and Ms. Vincent, including coming into his work space without properly disinfecting themselves.

Appellant claimed that he was approached by Dr. Fort about safety matters. Dr. Fort told him that he and Dr. Christian shared a “brotherhood” as dentists and that he “would prefer to step aside” and let him handle the situation. Appellant was “disappointed and crushed” when Dr. Christian took work away from him then discussed the matter with Dr. Fort, Ms. Vincent, and Michael Finley, a coworker. He claimed that he was unfairly required to perform Dr. Christian’s preparatory work and suggested that coworkers carried out infection control violations in order to provoke a “violent reaction” from him. Appellant asserted that Dr. Fort was an “ineffective and unqualified manager” and that supervisors unfairly criticized his work performance and tried to have him declared unfit for duty.

In a statement received by the Office on September 1, 2006, Dr. Fort stated that some of appellant’s concerns about infection control practices were valid, such as staff not removing masks before leaving their working spaces. However, these concerns were addressed swiftly and effectively. Dr. Fort asserted that appellant’s health was never in jeopardy due to these minor matters. He stated that the facility has a certified infection control nurse practitioner who investigated appellant’s concerns about disinfection techniques used in the work unit. The nurse practitioner found that there was nothing inappropriate about the techniques. She found that the level of disinfection suggested by appellant was not necessary to make prosthetic dental devices. Dr. Fort asserted that appellant had not been harassed by supervisors or coworkers and indicated that he diligently responded to all of appellant’s concerns.<sup>2</sup>

The record contains a July 20, 2006 mediation settlement agreement that was reached in connection with a grievance appellant filed against the employing establishment. The agreement provided, among other things, that Dr. Fort would meet with Dr. Christian and Ms. Vincent to discuss “professional behavior and conduct standards,” that appellant would participate in any future mediation with Dr. Christian should Dr. Christian agree to such mediation, and that Dr. Fort would respond to all of appellant’s reports of professional misconduct on the same day as the occurrence. The settlement agreement provided that it did not “constitute either an admission or concession of wrongdoing by either party of the Agency and will not be represented as such by anyone.”

---

<sup>2</sup> In an October 4, 2006 statement, Dr. Fort stated that after he investigated appellant’s claim that coworkers had not properly disinfected themselves the involved parties assured him that they were properly disinfected.

In a February 15, 2007 decision, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. It found that appellant did not establish that the employing establishment subjected him to harassment and discrimination or committed error or abuse with respect to administrative matters. The Office determined that appellant had not factually established his claim that his health was threatened by infection control violations.

Appellant submitted August 28, 2006, February 16 and March 10, 2007 statements in which he further discussed his claimed employment factors. He alleged that his work unit used an inappropriate and ineffective type of disinfectant on dental devices and therefore he was subjected to a host of contagious diseases. Appellant asserted that Dr. Christian and his assistants repeatedly came into his work space without disinfecting themselves and that numerous officials failed to address his concerns. He claimed that the employing establishment mishandled his leave requests, committed age discrimination, and subjected him to disciplinary actions in retaliation for filing grievances.<sup>3</sup>

In a February 26, 2007 statement, Mr. Finley stated that he witnessed appellant being subjected to harassment and discrimination, mostly by Dr. Christian and Ms. Vincent. He claimed that in early 2006 Dr. Christian, Dr. Fort and Ms. Vincent contaminated appellant's work space by entering with contaminated masks and gloves. Mr. Finley alleged that Ms. Vincent deliberately tried to provoke appellant by committing such actions. He asserted that Dr. Christian mischaracterized an encounter with appellant on August 4, 2006.<sup>4</sup> Mr. Finley claimed that appellant had to protect himself against the "repeated assaults" of Dr. Christian and Ms. Vincent. Appellant submitted e-mails in which Melissa Ignacio, a certified infection control nurse practitioner for the work unit, discussed the use of various disinfectants in the workplace.

Appellant requested a review of the written record by an Office hearing representative. In a July 11, 2007 decision, the Office hearing representative affirmed the Office's February 15, 2007 decision.

### **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.<sup>5</sup> On the other hand, the disability is not covered where it results from such factors as an

---

<sup>3</sup> Appellant also submitted additional reports of Dr. Kelley and other attending physicians.

<sup>4</sup> In an undated statement, Mr. Finley stated that on August 4, 2006 appellant used an expletive in Dr. Christian's presence. The August 4, 2006 incident was the subject of one of the disciplinary actions taken against appellant.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>6</sup>

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.<sup>7</sup> This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>8</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>9</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>10</sup>

### ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant asserted that between March and July 2006 he was subjected to harassment and discrimination by two supervisors, Dr. Christian and Dr. Fort, and a coworker, Ms. Vincent. He indicated that he was "disappointed and crushed" when Dr. Christian took work away from him and then discussed the matter with Dr. Fort, Ms. Vincent, and Michael Finley, a coworker. Appellant claimed that he was unfairly required to perform Dr. Christian's preparatory work and suggested that coworkers, particularly Ms. Vincent, carried out infection control violations in order to provoke a "violent reaction" from him. He alleged that the employing establishment committed age discrimination and subjected him to disciplinary actions in retaliation for filing

---

<sup>6</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>7</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>8</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>9</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>10</sup> *Id.*

grievances. Appellant asserted that, after he told Dr. Christian that a case of tooth crowns had been rendered unusable, Dr. Christian did not speak to him for “many weeks” thereafter.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant’s performance of his regular duties, these could constitute employment factors.<sup>11</sup> However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>12</sup>

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.<sup>13</sup> Appellant submitted a statement of Mr. Finley who asserted that he was subjected to harassment and discrimination by Dr. Fort and Ms. Vincent. However, this statement is of limited probative value as Mr. Finley’s assertions of harassment and discrimination lack specificity. The record contains a July 20, 2006 mediation settlement agreement that was reached in connection with a grievance concerning many of appellant’s claims of harassment and discrimination. The agreement provided, among other things, that Dr. Fort would meet with Dr. Christian and Ms. Vincent to discuss “professional behavior and conduct standards,” but the agreement explicitly indicated that there was no finding of wrongdoing by any employee.<sup>14</sup> Therefore, appellant did not provide sufficient corroborating evidence to establish that the alleged actions actually occurred.<sup>15</sup> Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant claimed that in the first half of 2006 there were a number of infection control violations by Dr. Christian and Ms. Vincent who came into his work space without properly disinfecting themselves. He alleged that his work unit used an inappropriate and ineffective type of disinfectant on dental devices and therefore he was subjected to a host of contagious diseases. The Board has recognized that unsafe work conditions can constitute a factor of employment.<sup>16</sup>

However, appellant did not establish the factual aspects of this aspect of his claim in that he did not submit sufficient evidence to support his assertions that he actually was subjected to contamination such that he had to work in an unsafe environment. Dr. Fort stated that some of appellant’s concerns about infection control practice were valid, such as staff not removing

---

<sup>11</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>12</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>13</sup> *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

<sup>14</sup> The agreement provided that it did not “constitute either an admission or concession of wrongdoing by either party of the Agency and will not be represented as such by anyone.”

<sup>15</sup> *See William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>16</sup> *See Peggy Ann Lightfoot*, 48 ECAB 490, 494 (1997).

masks before leaving their working spaces, but indicated that these concerns were addressed swiftly and effectively. He asserted that appellant's health was never in jeopardy due to these minor matters and noted that Ms. Ignacio, a certified infection control nurse practitioner, investigated appellant's concerns about disinfection techniques used in the work unit and found that there was nothing inappropriate about the techniques.<sup>17</sup>

Appellant claimed that the employing establishment mishandled his leave requests and work assignments, improperly disciplined him, and failed to address his safety concerns.<sup>18</sup> He asserted that supervisors unfairly criticized his work performance and improperly tried to have him declared unfit for duty. Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly denied leave, and improperly assigned work duties, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>19</sup> Although the handling of disciplinary actions and performance evaluations, the granting of leave requests, the assignment of work duties, and the handling of safety matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.<sup>20</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>21</sup>

The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. The above-described grievance addressed some of these matters but the July 20, 2006 settlement agreement contained no finding that the employing establishment committed wrongdoing with respect to administrative matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

---

<sup>17</sup> The record contains e-mails in which Ms. Ignacio discussed the use of various disinfectants in the work, but she did not indicate that unsafe conditions occurred due to the misuse of such disinfectants. Mr. Finley claimed that appellant was subjected to contamination but his vague comments in this regard would not establish the existence of such contamination.

<sup>18</sup> Appellant claimed that, when he approached Dr. Fort about Dr. Christian's safety infractions, Dr. Fort told him that he and Dr. Christian shared a "brotherhood" as dentists and that he "would prefer to step aside" and let him handle the situation.

<sup>19</sup> See *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).

<sup>20</sup> *Id.*

<sup>21</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.<sup>22</sup>

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' July 11 and February 15, 2007 decisions are affirmed.

Issued: January 16, 2008  
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

---

<sup>22</sup> 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, 502-03 (1992).