

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

G.M., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Coleman, FL, Employer**

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**Docket No. 08-312
Issued: July 17, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 15, 2007 merit decision denying his emotional condition claim. He also appealed the Office's September 6, 2007 decision finding that he abandoned his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether appellant abandoned his request for an oral hearing.

FACTUAL HISTORY

On July 10, 2006 appellant, then a 37-year-old lieutenant, filed an occupational disease claim alleging that he sustained major depression, severe anxiety and aggravation of preexisting post-traumatic stress disorder (PTSD) while working at a federal correctional complex. He

indicated that his claimed condition was caused by “working in a correctional law enforcement environment, to include employment factors such as working in a confined institution, dealing with inmates, risk of safety, negativity, supervision of staff, etc.” Appellant stated that he first became aware of his claimed condition on July 7, 2006 and first realized that it was caused or aggravated by his employment on the same date.

In an attached statement, appellant indicated that in 1999 he was diagnosed with PTSD related to his military service and asserted that this condition was aggravated by employment factors. He stated:

“Once again the conditions responsible for my present emotional condition are the adherent stressors and emotional reaction to working as a lieutenant in a correctional environment specifically the overall mental concentration required to maintain the care, custody, and control of inmates, the exposure to danger and potential violence, daily contact to convicted felons, responding to emergencies, the risk of contracting disease, lack of respect and treatment of supervisors, constant risk of injury or harm, noise levels, temperature, over-crowdedness, isolation of being in a prison, emotionally draining situations (for example resolving inmate disputes, inmate fights, inmate investigations, etc.), and routine critical decision making requirements, working rotating shifts, weekends and holidays.”

* * *

“The filing of the MSPB [Merit Systems Protection Board] complaint under the Whistle Blower Act and subsequent retaliation by supervisors have augmented these above stressors. Frivolous allegations of absent without leave have also served to increase stress (absent without leave dates: November 26, 2004, September 8 -- October 1, 2005).”

In a January 26, 2007 letter, the Office requested that appellant submit additional factual and medical evidence in support of his claim. With respect to the employment conditions and incidents believed to cause the claimed condition, it requested appellant to be as specific as possible and to identify “any relevant dates, locations, coworkers, supervisor, duties, etc.” The Office stated, “For events or duties which you identify, describe how often they occurred and for how long.”

Appellant submitted numerous medical reports, dated between August 2005 and May 2006, describing the treatment of his emotional problems. In an undated statement received by the Office on February 27, 2007, he described his claimed employment factors in the same terms he used in his initial statement. Appellant also stated:

“I was denied scheduled leave from my supervisor Captain Barat, after being granted the leave by the Associate Warden Lockett. My supervisor claimed my leave was cancelled due to shortage of lieutenants.

“I have filed an [Equal Employment Opportunity] complaint for disparate treatment and retaliation by my supervisors, I have also complained to the [MSPB]. Currently my EEO complaint is being handled under a class action suit.

“My outside stressors are I was divorced and now remarried. I have been going through a very difficult period while fighting for custody and visitation rights to my children. I have also been under stress due to applying for over 40 jobs within the [F]ederal [G]overnment. I have been turned down for the majority of these jobs. I have been passed over by other staff ... that are at a lower pay grade and ... age. I have also included these facts in my EEO complaint.”

In a March 15, 2007 decision, the Office denied appellant’s emotional condition claim on the grounds that he did not establish any compensable employment factors. It indicated that appellant did not submit any probative factual evidence to support the existence of the claimed employment factors.

On March 27, 2007 appellant requested an oral hearing with an Office hearing representative, in the form of a telephone conference, concerning the Office’s March 15, 2007 decision.¹ In a July 9, 2007 letter, the Office advised appellant that a telephone hearing would be held with an Office hearing representative on August 13, 2007 at 9:00 a.m., Eastern time. It provided appellant with a toll-free number that he should call a few minutes before the allotted hearing time.²

In a September 6, 2007 decision, the Office determined that appellant abandoned his request for an oral hearing. It indicated that appellant failed to make an appearance via a telephone conference with an Office hearing representative on August 13, 2007. The Office stated that there was no indication in the record that appellant contacted it either prior or subsequent to the scheduled hearing to explain his failure to appear.

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 duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.³ On the other hand, the disability is not covered where it results from such factors as an

¹ Appellant submitted additional medical evidence in support of his claim.

² The letter was sent to appellant’s address of record.

³ 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.⁴

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.⁵ 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.⁶

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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. In a March 15, 2007 decision, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that he sustained stress due to the mental concentration required to maintain the care, custody and control of inmates. He asserted that he was exposed to "danger and potential violence," had to respond to emergencies, and risked sustaining injury and contracting disease. Appellant indicated that he was exposed to "noise levels, temperature, overcrowdedness" and emotionally draining situations such as "resolving inmate disputes, inmate fights, inmate investigations, etc." He stated that he worked rotating shifts, weekends and holidays.

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁸ *Id.*

The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.⁹ However, appellant has not established the factual aspects of his claim in this regard. He did not provide a sufficiently detailed description of the duties and conditions of his job. Appellant only described his claimed stressors in the most general terms. He indicated that he had close contact with inmates but he did not describe the nature of this contact in any detail, nor did appellant provide supporting evidence such as a formal job description or other documents which would help clarify the nature of his job. The Office provided appellant the opportunity to provide this evidence but he did not submit any further detail description or evidence regarding this matter. Appellant did not describe in any detail the environment of the job¹⁰ or the risks (such as the risk of injury or disease) which he felt caused him stress. He indicated that he was involved with emergencies, disputes, fights and investigations, but he provided no details of these matters such as dates of incidents, persons involved, frequency of handling such matters and so forth.¹¹

Appellant alleged that supervisors retaliated against him by harassing him after he filed an MSPB claim. He also suggested that he was subjected to discrimination by management in the course of applying for many jobs.¹² 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.¹³ 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.¹⁴ Appellant did not provide any description of the harassment and discrimination he encountered after filing an MSPB claim. He provided no corroborating evidence, such as witness statements or the findings of grievances, to establish that he was actually subjected to harassment or discrimination.¹⁵ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant also alleged that the employing establishment wrongly denied several leave requests and wrongly characterized his absences on November 26, 2004 and from September 8 to October 1, 2005 as absent without leave. Regarding his allegation that the employing establishment wrongly handled leave matters, the Board finds that this allegation relates to

⁹ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

¹⁰ The Board has recognized that exposure to such work conditions as extreme noise or temperature can constitute a factor of employment. See *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ Appellant indicated that he worked rotating shifts, weekends and holidays, but he did not describe the frequency and duration of such work.

¹² Appellant indicated that a number of jobs were given to younger staff members who were at lower pay grades.

¹³ *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

¹⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁵ See *William P. George*, 43 ECAB 1159, 1167 (1992). Appellant indicated that he filed an EEO claim regarding some of these matters, but the record does not contain any documents regarding his EEO claim.

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.¹⁶ Although the handling of leave requests is generally related to the employment, it is an administrative function of the employer, and not a duty of the employee.¹⁷ 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.¹⁸ However, appellant did not submit any evidence to establish that the employing establishment committed error or abuse with respect to the handling of leave matters. Thus, he has not established a compensable employment factor under the Act with respect to administrative matters.

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.¹⁹

LEGAL PRECEDENT -- ISSUE 2

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the

¹⁶ 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).

¹⁷ *Id.*

¹⁸ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁹ 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).

claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”²⁰

ANALYSIS -- ISSUE 2

In the present case, the Office scheduled an oral hearing via telephone with an Office hearing representative at a specific time on August 13, 2007. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear for the scheduled telephone hearing²¹ and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office’s procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.²²

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. The Board further finds that appellant abandoned his request for an oral hearing.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

²¹ Appellant was directed to call a toll-free number a few minutes before 9:00 a.m., Eastern time, on August 13, 2007, but there is no indication that he did so or otherwise made himself available for the August 13, 2007 hearing.

²² See also *Claudia J. Whitten*, 52 ECAB 483, 485 (2001).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 6 and March 15, 2007 decisions are affirmed.

Issued: July 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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