United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 09-531**
	)	**Issued: December 23, 2009**
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT AGENCY, Fort Huachca, AZ, 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, 2008 appellant filed a timely appeal of a September 10, 2008 decision of the Office of Workers' Compensation Programs that denied modification of a February 20, 2008 decision, denying his claim for an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition or vascular disease in the performance of duty.

FACTUAL HISTORY

On October 30, 2007 appellant, then a 55-year-old quality assurance specialist, filed an occupational disease claim alleging harassment by coworkers and military personnel at work. He first became aware of his condition and its relation to his work on April 15, 2006. Appellant stated that he delayed filing his claim because "[it] was determined to be false and was not accepted by management." The employing establishment noted being aware of the claim on

October 10, 2007. It noted that appellant was removed from work due to workplace violence which was later changed to a resignation, effective August 31, 2006, in settlement of an appeal.[1]

Appellant also filed a second occupational disease claim on October 30, 2007.[2] He attributed his heart disease and leg swelling to harassment by a coworker. Appellant alleged that he sat down and a coworker kicked his leg. He informed his supervisor and was advised that the matter would be investigated. Appellant first became aware of the injury and its relation to his work on January 10, 2006. In this claim, on August 18, 2007 appellant filed a claim alleging a recurrence of disability on January 10, 2006. He experienced heart and chest pain along with shortness of breath, leg swelling and bleeding. Appellant asserted that management did not investigate the matter or take action against the coworker. He stated that this supervisor struck him in the chest with her fist and bruised the area over his heart. Appellant advised that he was subjected to a series of intimidating telephone calls from his supervisor at work and home, which caused increased stress. He also alleged that he was teased and humiliated by former coworkers and contract personnel.

In a letter dated October 31, 2007, the employing establishment controverted the claim. It reiterated that appellant was removed for misconduct.

On November 2, 2007 the Office requested additional evidence from appellant and the employing establishment.

On November 6, 2007 the Office received several undated statements from appellant who alleged that he was denied leave, lost 12 hours of leave that was not restored and was called to the office for a meeting when he had no leave. Appellant stated that he passed a course in 2003 and was not given his diploma until 2005 and that his name was misspelled on the diploma. He noted being called names by coworkers and supervisors, including "Conroy" which was short for a sexual deviant, "Kraut," "Square-Head" and "Krapper." He had problems getting his claim forms accepted. Appellant had high blood pressure, depression, difficulty concentrating and wore hearing aids. In a January 10, 2006[3] statement, he indicated that he was in the restroom when Mike Pokorski asked him, "buddy, why did you hit me?" Appellant denied striking Mr. Pokorski. He also indicated that another coworker, Tom Barnes, denied hearing anything. Appellant also indicated that Mr. Pokorski "flipped me several times" during the team meeting.

In a February 17, 2006 statement, Ivan R. Mortensen, appellant's supervisor, indicated that, during the five months appellant worked for him, he was competent, professional and there were no problems.

On November 27, 2007 the Office held a conference with Managers Barry Wade, Kathleen Olson, Kenneth Filishch and Thomas Wolma. Mr. Wade alleged that appellant was involved in an altercation with a coworker which was an issue of violence in the workplace. He stated that appellant struck a coworker with a book on January 10, 2006. As a result, appellant

[1] Claim No. xxxxxx761.

[2] Claim No. xxxxxx762. Both claims were combined under master file number xxxxxx761.

[3] The Board notes that the statement actually indicates 2005; however, this appears to be a typographical error.

was issued a notice of removal, which was formally adjudicated and appealed to the Merit Systems Protection Board (MSPB). Mr. Wade noted that appellant resigned effective August 31, 2006 in full settlement of the appeal.

Mr. Wolma indicated that he was unaware of appellant being denied leave. He confirmed that appellant was called into the office in 2006, while on leave, for disciplinary action. Regarding appellant's diploma, Mr. Wolma was not aware that appellant's name was misspelled; however, once it was brought to his attention, he printed a copy for appellant as an "official" diploma was not available. He confirmed that the diploma had no impact on appellant's job duties or performance appraisals. Mr. Wolma noted that appellant filed an Equal Employment Opportunity (EEO) complaint, which was settled with no finding of fault or error. He was not aware of any issues related to name calling. Mr. Wolma stated that he may have called appellant "Conroy" by mistake, as there was a Major Conroy on staff, which was similar to appellant's name. Mr. Wolma was unaware of the name "Conroy" being derogatory. Additionally, in a June 20, 2002 letter, he responded to a grievance related to the two-year delay in a certificate being presented to appellant. He explained the circumstances surrounding the certificate, apologized for the delay, which was due to no fault of his own, and noted that it would be presented to appellant on July 15, 2002. A copy of the May 21, 2002 resolution of this certificate issue was submitted.

Ms. Olson was unaware of any name calling. Regarding the kicking incident, it took place in a training/conference room when appellant accused Mr. Pokorski,[4] of kicking him in the leg. Ms. Olson noted that Mr. Pokorski was not in the same vicinity as appellant and there were no witnesses to the event. Appellant proceeded to strike Mr. Pokorski on the head in the men's restroom. Ms. Olson noted that Mr. Pokorski came to her office and then appellant appeared and "took a swing" at her. She denied striking appellant. Ms. Olson further noted that both employees submitted written statements and were sent home. This action started the removal process for appellant. Ms. Olson provided a January 10, 2006 statement that described the incident. She did not believe that appellant intended to strike her, but rather it occurred in the midst of the excitement. Ms. Olson also provided a January 19, 2006 statement which indicated that she and a union representative, Duane Rowlson, visited appellant in the hospital to provide him with claim forms. In March 6, 2006 e-mail correspondence, she advised appellant of the forms needed to file a claim. Ms. Olson included a copy of a January 12, 2006 incident report, in which appellant indicated that he had cut his left leg on an assembly fixture.

In a January 10, 2006 statement, Larry Johnson, a coworker indicated that when he entered the conference room for the 15-minute afternoon team meeting, he noticed that appellant sat next to Mr. Pokorski, despite the fact that all the seats in the front were empty. He noted that he did not hear or see anything negative throughout the meeting. In a January 22, 2006 statement, Larry Covington, a management assistant, witnessed Ms. Olson and Mr. Pokorski going into Ms. Olson's office on Tuesday, January 22, 2006 about 13:30 p.m. He stated that appellant walked up and pushed up the door. Mr. Covington also heard appellant state in a loud voice something about "that's not the way it happened."

[4] Although the statement indicates McCloskey, this appears to be a typographical error.

The employing establishment provided documents related to the removal action, including: a January 17, 2006 proposed notice of removal, notice of removal from the employing establishment dated March 13 and 15, 2006, which advised that appellant was found to have intentionally struck a coworker and for conduct unbecoming a federal worker;[5] and a June 19, 2006 employing establishment response to appellant's appeal of the removal action. In a July 24, 2006 settlement agreement, the employing establishment agreed to reinstate appellant, effective April 2, 2006, and place him in sick leave status until August 31, 2006. Appellant agreed to waive his claims of discrimination in exchange for payment of sick leave and benefits, a neutral reference limited to job series, salary and dates of employment. He agreed to resign effective August 31, 2006. The employing establishment agreed to rescind the letter of removal and remove all reference from his personnel file and allowed him to resign for personal reasons with a clean record. The Office also received an August 2006 negotiated settlement related to the notice of removal.

On January 31, 2008 appellant denied striking a coworker with a book. Appellant alleged that there were staff shortages and that the reason he was called into the employing establishment was that he was advised that he was being transferred. The delay regarding his diploma was due to the actions of Mr. Wolma and that training was related to his advancement. Appellant alleged that he was given a lower performance rating than another employee who passed the examination at the same time. He reiterated that he was called names, kicked by a coworker and Ms. Olson struck and pushed him. Appellant denied taking a swing at Ms. Olson.

In an August 25, 2006 statement, Brian Farrell, a coworker, advised that he had worked with appellant for 18 years. He heard people call appellant names and make fun of his last name. Mr. Farrell alleged that the names included "Conroy," "Kraut," and "Krapper." He stated that appellant wore hearing aids and alleged that "other people called him names behind his back because he is hard of hearing." Mr. Farrell indicated that they mangled his name to "get a rise out of him" or to "spite" him. He alleged that both Mr. Wolma and Ms. Olson called him names. Mr. Farrell visited appellant at the hospital in early January 2006 and saw that his left leg had sores. He noted that appellant indicated that these were where Mr. Pokorski had hit him. Mr. Farrell indicated that appellant showed him two large bruises on his left chest and indicated that they were from his team leader, Ms. Olson.

By decision dated February 20, 2008, the Office denied appellant's claim on the basis that the alleged events were not established as having occurred in the performance of duty.

On March 5, 2008 appellant's representative requested a hearing, which was held on July 9, 2008. Appellant did not have medical evidence relating the kicking incident to his heart condition. Appellant's representative noted that he was unable to find any individual at the employing establishment that would provide a statement in support of appellant's allegations. He explained that during the January 10, 2006 team meeting, Mr. Pokorski began calling him names. Appellant initially moved to the back of the room; however, he had difficulty hearing Ms. Olson speak and took a seat in the front of the room, after a break, which was next to

[5] In e-mail correspondence dated March 13, 2006, responding to appellant's assertions, Ms. Olson indicated that she was barely five feet six inches tall, whereas appellant is six feet four inches tall. She denied that she pushed appellant, but rather noted that she placed her hand on his chest to lead him out of the office.

Mr. Pokorski. Appellant alleged that Mr. Pokorski kicked him and then struck him on his head. He then moved to the back of the room. When he tried to report the matter, Ms. Olson refused to listen to him. He also denied striking Mr. Pokorski in the restroom. Appellant then went to Ms. Olson's office and found Mr. Pokorski there. At that point, he alleged that Ms. Olson struck him in the chest with her fist and knocked him backwards. Appellant indicated that he was approximately seven inches taller than Ms. Olson and had poor balance due to his hearing condition.

In August 4, 2008 comments, Mr. Wade, an injury compensation manager, responded to the transcript of proceedings and provided a July 15, 2008 statement from Ms. Olson. He noted that on January 10, 2006 Mr. Pokorski reported that appellant had struck him in the back of the head with a book. Mr. Wade noted that they went to Ms. Olson's office with Mr. Pokorski to discuss the matter and appellant approached them while they were inside. He stated that appellant was agitated and waiving his arms in an excited manner and thereafter Ms. Olson stepped between them to keep them apart. Mr. Wade noted that Ms. Olson denied striking appellant. Ms. Olson's statement reiterated these points and confirmed that she placed her hands on appellant's chest and gently directed him out of her office and advised him to go to the training room, where she would meet with him so he could provide a written statement. She noted that she is approximately five feet five inches tall while appellant is approximately six foot four inches tall. Ms. Olson denied being aware of anyone calling the claimant names and noted that he had not made any complaints to her concerning this. She further noted that, while appellant alleged that Mr. Pokorski had kicked him, no mention of any injury was made. Ms. Olson interviewed people in close proximity to the individuals and no one saw any actions by Mr. Pokorski toward appellant. She stated that the first she heard of appellant's injury was on January 19, 2006 when he reported he had injured his leg at a plant in Michigan. A copy of the employing establishment's statement was provided to appellant.

By decision dated September 10, 2008, the Office hearing representative affirmed the February 20, 2008 decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[6] 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.[7]

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

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 adversely affected by employment factors.[8] 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.[9]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[10] 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[11]

ANALYSIS

Appellant alleged that he sustained an emotional condition and heart disease due to several employment incidents and conditions. The Board must initially review whether the alleged incidents and conditions of employment are compensable under the terms of the Act.

Appellant alleged being kicked in the leg by Mr. Pokorski on January 10, 2006 and derogatorily "flipped." He alleged that Ms. Olson struck him in the chest that day. The Board has recognized the compensability of physical threats and assaults in certain circumstances. Physical contact arising in the course of employment may give rise to a compensable factor of employment.[12] In this case, however, the weight of the evidence does not support appellant's allegation of a physical assault by Ms. Olson or Mr. Pokorski. Regarding Mr. Pokorski, the Board finds that appellant's statements are contradictory and unclear. On the same date he alleged that he was kicked in the leg by his coworker, he completed a January 12, 2006 incident report alleging that he cut his left leg on an assembly fixture. On January 10, 2006 appellant alleged that Mr. Pokorski asked him, "why did you hit me?" and the record indicates that appellant was removed from his employment after he struck Mr. Pokorski. While appellant provided a statement from Mr. Farrell who visited him in the hospital and noted seeing sores on his left leg that he attributed to Mr. Pokorski striking him, Mr. Farrell did not state that he witnessed appellant being struck. Appellant presented insufficient evidence to establish that Mr. Pokorski struck him. The employing establishment also provided a statement from

[8] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

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

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

[11] *Id.*

[12] *See Helen Casillas*, 46 ECAB 1044 (1995).

Mr. Johnson, who was in the room during the alleged incident; and he advised that he did not see or hear anything during the meeting. As noted, the employing establishment determined that it was appellant who struck his coworker with a book in the men's room. Thus, the evidence does not support that Mr. Pokorski struck appellant as alleged.

Regarding Ms. Olson, the evidence does not support that she struck appellant as alleged. She explained that, when appellant entered her office, he was agitated and waiving his arms in an excited manner. Ms. Olson stepped between appellant and Mr. Pokorski. She noted that she was five feet five inches tall and he was six feet four inches tall. Appellant presented insufficient evidence to establish that Ms. Olson assaulted him Ms. Olson denied striking appellant and provided a reasonable explanation for her actions on January 10, 2006. Appellant has not established a compensable factor in this regard.

Appellant made allegations related to administrative or personnel matters. These allegations are unrelated to his regular or specially assigned work duties, and do not generally fall within the coverage of the Act.[13] However, the Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse. In determining whether the employing establishment erred or acted abusively, the Board has examined whether management acted reasonably.[14]

Appellant contended that the kicking incident was not adequately investigated by management. The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regular or specially assigned employment duties are not considered to be employment factors.[15] The record supports that the employing establishment took action regarding appellant's assertions. As noted, Ms. Olson confirmed that she was investigating the incident and spoke to Mr. Pokorski when appellant came into her office. A review of the evidence indicates that appellant has not established that the employing establishment's actions in connection with its investigation were unreasonable. The record reflects that the employing establishment investigated the incident and reasonably took action that it deemed appropriate. The evidence does not establish error or abuse by management in this matter.

Appellant alleged that he could not get leave approved, lost 12 hours of annual leave and had difficulty obtaining forms for his compensation claim. The Board had held that the development of an emotional condition related to the processing of compensation claimed do not arise in the performance of duty as it bears no relation to appellant's day-to-day or specially assigned duties.[16] There is no evidence of error or abuse in the denial of leave. The Board has

[13] An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *Sandra Davis*, 50 ECAB 450 (1999).

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

[15] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[16] *See Lori A. Facey*, 55 ECAB 217 (2004); *George A. Ross*, 43 ECAB 346, 353 (1991).

held that absent evidence of error or abuse, decisions regarding the handling of leave requests are an administrative function and not a compensable factor.[17]

Appellant alleged that the two-year delay in receiving a copy of his certificate/diploma hindered his work performance, his ability to gain a promotion and that his name was misspelled. The Board has held that denials by an employing establishment of a promotion not compensable factors of employment under the Act, as they do not involve his ability to perform his regular or specially assigned work duties, but rather constitute her desire to work in a different position.[18] Mr. Wolma addressed appellant's diploma and explained that he was unaware that his name was misspelled; however, after it was brought to his attention, he printed a new copy. He also confirmed that part of the delay was outside his control and that it had no impact on appellant's job duties or his performance appraisals. The settlements of record did not provide any finding of error or abuse by either party.[19] The Board finds that appellant has not presented evidence of error or abuse.

Appellant alleged these actions constituted harassment and discrimination by his supervisors and coworkers. 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.[20] 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.[21] The employing establishment denied that appellant was harassed or discriminated against and the Board finds that he has not submitted sufficient evidence to establish his allegations.[22] Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination.

Appellant alleged that he was harassed by supervisors and coworkers who ridiculed him and called him names such as "Conroy," which appellant asserted was sexually derogatory, "Kraut," "Square-Head" and "Krapper." He protested the name calling which caused him a great deal of stress. Appellant submitted a statement from Mr. Farrell, who indicated that he had heard appellant being called these names. However, Mr. Farrell merely noted that he had heard "people" call appellant names and did not identify any specific individuals or times and places in

[17] *See Beverly R. Jones*, 55 ECAB 411 (2004).

[18] *Donald W. Bottles*, 40 ECAB 349, 353 (1988). *See also D.L.*, 58 ECAB ___ (Docket No. 06-2018, issued December 12, 2006) (the assignment of work by a supervisor, the granting or denial of a request for a transfer and the assignment to a different position are administrative functions that are not compensable absent error or abuse).

[19] *See James E. Norris*, 52 ECAB 93 (2000) (grievances and EEO complaints, by themselves, do not establish harassment or unfair treatment).

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

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

[22] *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).

which any such incident occurred. Further, Mr. Wolma and Ms. Olson indicated that they were unaware of any issues related to name calling or disparate treatment. Mr. Wolma indicated that another person who worked at the employing establishment was named Conroy and it was possible he could have called appellant Conroy by mistake. Mr. Wolma also denied being aware that the name Conroy had a negative connotation. The evidence of record is not sufficient to establish harassment, as alleged.

Appellant also asserted that he was harassed when the employing establishment called him at home. The employing establishment confirmed that appellant was called at home while on leave. However, Mr. Wolma explained that appellant was on administrative leave for disciplinary reasons and needed to contact him. The evidence does not support that his contact was in error or abusive such as to constitute a compensable factor of employment.

Appellant has not established that any of the actions by the employing establishment to which he attributes his emotional or cardiac conditions are compensable factors of employment. Therefore, he has not established his claim.[23]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition or an occupational disease in the performance of duty.

[23] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2009
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