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W.R., Appellant	)	
	)	
and	)	Docket No. 08-1556
	)	Issued: January 5, 2009
DEPARTMENT OF VETERANS AFFAIRS,	)	
VETERANS ADMINISTRATION MEDICAL	)	
CENTER, North Little Rock, AR, Employer	)	
	)	

Case Submitted on the Record

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On May 7, 2008 appellant, through counsel, filed a timely appeal from an April 3, 2008 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed an August 24, 2007 decision denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

The issue is whether appellant has established that he sustained an emotional condition causally related to his federal employment.

On May 22, 2007 appellant, then a 50-year-old housekeeping aid, filed an occupational disease claim alleging that on January 7, 2001 he first became aware of his depression. He attributed his depression to work stress and being forced to resign his position due to his preexisting disability on November 19, 2004. Appellant resigned from the employing

establishment effective December 13, 2005. On the SF50 form noting his resignation, he wrote that he was forced to resign his position due to depression.

In support of his claim, appellant submitted progress notes dated November 19, 2004 from Willie J. Davis, LPN and Pamela R. Capel, RN and November 29, 2004 from Dr. Eve J. Wiseman, an attending Board-certified psychiatrist. Ms. Davis and Ms. Capel stated that appellant was seen on November 14, 2004 for depression which had been present for the prior three days. Dr. Wiseman diagnosed depression. She noted appellant was first diagnosed with depression in 2001. Dr. Wiseman noted that appellant stated he lost memory of 24 hours the previous October and had no recall of what happened during that period.

By letter dated July 12, 2007, the Office requested appellant to submit additional medical and factual information as the evidence currently in the record was insufficient to support his claim.

On July 30, 2007 the Office received evidence from the employing establishment. It provided a copy of his position description, a December 9, 2005 resignation letter, letters regarding his removal from the employing establishment and a June 30, 2005 last chance agreement signed by appellant. An undated letter informed appellant that his removal was being held in abeyance subject to the terms of the last chance agreement and that he was being suspended for seven days. The June 30, 2005 last chance agreement listed the terms for appellant's continued employment and his acknowledgement that the employing establishment had valid reasons for seeking his removal. The agreement provided that he read and understood his responsibilities regarding leave and absences and that any "failure to meet my responsibilities as described will be considered a violation of this agreement." Under paragraph eight of the agreement, it noted that "[A]ny misconduct, which would normally lead to disciplinary/adverse action during the time frames of this agreement" would be a violation of the agreement and result in his immediate removal.

In a November 25, 2005 letter, the employing establishment informed appellant that his removal would be effective December 16, 2005. It found that he had violated paragraph 8 of the last chance agreement. The employing establishment noted that appellant failed to supply the requested medical documentation for leave used on September 18 and 24, 2005, which was a violation of his agreement. Appellant's December 9, 2006 letter stated that he was resigning his position as he was moving out of town.

In letters dated March 11 and April 15, 2005, appellant contended that he was disabled due to a major depressive episode of March 4 to 8, 2005 and that he believed he had called in sick to work on March 6, 2005. In a response for information, he noted that on October 4, 2004 he was out of his work area as he was on his morning break and was trying to contact his family in Florida. Appellant noted that Pennie Thompson, a supervisor, stated that she did not care for his reason for being away from his duty station and that she was going to write him up as being insubordinate and absent without leave. He noted that, when he was approached by Ms. Thompson, he had been trying to contact his mother to ensure she was okay as he had been unable to reach her for the prior two weeks.

In a November 30, 2004 report, Dr. Ben Wilson diagnosed depression aggravated by appellant's employment.

In a June 9, 2005 contact report, Albert R. Tabieros, a patient representative, related that appellant contacted him based of his belief that his supervisors were harassing him. Appellant related that he had been written up for using a phone during work and that he was charged two days of being absent without leave when he was sick. Appellant contended that he had called in and provided a doctor's note. Appellant alleged that he was being written up for minor things over which he had no control and there was a pattern of harassment. Mr. Tabieros stated that he advised appellant to contact his Equal Employment Opportunity (EEO) office, human resources or his union regarding these matters.

On July 25, 2007 appellant detailed his job duties and noted that he had no stress outside of his federal employment. He alleged that his depression was aggravated by the chemical smells at work and that his supervisor was always on his back. Appellant noted that his mother had been hospitalized in May 2005 and he went to see her because she was dying. He received a telephone call at work from his mother after returning to work from visiting her. Appellant noted that he was given leave to attend his mother's funeral and that he experienced difficulty returning to work due to Hurricane Katrina. He informed his foreman regarding the difficulties in trying to get back to work and the foreman threatened him with the loss of his job if he did not return to work on "such and such day." Upon his return, appellant learned that he had been charged with five or six days of being absent without leave and was subsequently written up by various supervisors. He alleged that he was subjected to harassment and retaliation by supervisors.

By decision dated August 24, 2007, the Office denied appellant's claim. It found he had failed to establish any compensable factors of employment.

In a letter dated September 18, 2007, appellant's counsel requested an oral hearing before an Office hearing representative. A telephonic hearing was held on January 7, 2008 at which appellant was represented by counsel and provided testimony.

By decision dated April 3, 2008, the Office hearing representative affirmed the denial of appellant's claim.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.¹

¹ Donna Faye Cardwell, 41 ECAB 730 (1990)

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,² the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.³ 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 under the Act.⁴ When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁵ 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 under the Act. 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 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.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

² 28 ECAB 125 (1976).

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Anthony A. Zarcone*, 44 ECAB 751 (1993)

⁵ *Lillian Cutler*, *supra* note 2.

⁶ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 2.

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

⁸ *Id.*

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of several employment incidents. The Board must initially review whether the alleged incidents of employment are compensable under the terms of the Act.

Appellant made several 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.⁹ However, the Board has held that an administrative or personnel matter will be considered 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.¹⁰

Appellant's alleged that his supervisors instituted improper disciplinary actions and forced him to resign. This pertains to administrative or personnel matters unrelated to his regular or specially assigned work duties.¹¹ Appellant also alleged being terminated for taking leave to visit his mother who was ill. Although, the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹² The record shows that appellant was issued a last chance agreement on June 30, 2005 which informed him that his employment could be terminated if he violated any of the terms of the agreement. It required that he provide medical certification for leave. The evidence establishes that appellant's supervisors acted reasonably in response to his failure to provide appropriate medical documentation when requested. Under the last chance agreement, appellant was on probation for two years and the violation of the agreement would result in his immediate termination. The evidence of record establishes that appellant did not comply with the terms of the agreement. Appellant has presented no evidence to support that his supervisors acted unreasonably in any disciplinary action or his termination from employment. He has submitted no evidence to support his allegation that he was terminated for using leave to visit his mother. Appellant has not established administrative error or abuse in these actions and they do not constitute a compensable factor under the Act.

Appellant also alleged he was improperly charged with being absent without leave when he took time off to attend his mother's funeral. The Board notes that, although the handlings of leave requests, while generally related to the employment, are administrative functions of the employer and not duties of the employee.¹³ The record contains no evidence regarding

⁹ 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. *V.W.*, 58 ECAB ____ (Docket No. 07-234, issued March 22, 2007); *Sandra Davis*, 50 ECAB 450 (1999).

¹⁰ See *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹¹ See *Janet I. Jones*, 47 ECAB 345 (1996), *Jimmy Gilbreath*, 44 ECAB 555 (1993); *Apple Gate*, 41 ECAB 581 (1990); *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

¹² *J.C.*, 58 ECAB ____ (Docket No. 07-530, issued July 9, 2007).

¹³ *C.S.*, 58 ECAB ____ (Docket No. 06-1583, issued November 6, 2006).

appellant's allegation that he was terminated for taking sick leave to visit his mother or that he was improperly charged with being absent without leave for the time he took to attend her funeral. Appellant alleged that he informed his supervisor of difficulty encountered in returning to work because of Hurricane Katrina. However, there is no evidence in support of this contention. Appellant has provided no evidence to show that the employing establishment ever improperly charged him with absent without leave. He has not established a compensable employment factor with respect to this administrative matter.

Appellant also alleged his depression was aggravated by his supervisor's harassment. He alleged the harassment started on October 4, 2004 when a supervisor wrote him up for being away from his work area. Appellant stated that he had informed the supervisor that he was on break and trying to contact his family in Florida. He alleged that he became upset when his supervisor would not allow him to continue his telephone call and the apparent lack of concern by the supervisor. Subsequently appellant received a letter for insubordination. He addressed the last chance agreement issued following his mother's death and funeral. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁴ However, for harassment to give rise to a compensable disability under the Act there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁵ Although, appellant diagnosed with his supervisor for writing him up for being away from his work area, his complaint about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager must be allowed to perform his duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.¹⁶ The Board finds that the evidence of record does not establish error, abuse or harassment on the part of the supervisor. Appellant acknowledged that he was not in his assigned work area at the time his supervisor directed him to return to work. There is no evidence establishing that appellant's supervisor acted unreasonably when writing him up for being away from his work area in issuing the last chance letter following his return to work. There is no evidence in the record that appellant's supervisor acted unreasonably. The Board finds that appellant has not established a compensable employment factor with respect to his allegations of harassment and discrimination. Appellant has not substantiated a compensable work factor. Since he has not established a compensable work factor, the Board will not address the medical evidence.¹⁷

¹⁴ *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). 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).

¹⁶ See *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006).

¹⁷ *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2008 is affirmed.

Issued: January 5, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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