United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 10-1639**
	)	**Issued: April 8, 2011**
DEPARTMENT OF VETERANS AFFAIRS, COATESVILLE MEDICAL CENTER, Coatesville, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2010 appellant, through his attorney, filed a timely appeal of a February 16, 2010 Office of Workers' Compensation Programs' merit decision on his emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

On appeal, counsel alleges that appellant has substantiated compensable employment factors and that his emotional condition claims should be combined.

FACTUAL HISTORY

On September 5, 2008 appellant then a 57-year-old physical therapist, filed an occupational disease claim alleging that he developed anxiety and depression due to factors of

his federal employment. He attributed his emotional condition to work factors occurring after his return to work following an accepted emotional condition claim. Appellant stated that the employing establishment was to provide him with a transcriber to help him with his paperwork as well as other assistance as a disabled worker, but failed to do so. He stated that he could not perform his work in a timely manner and experienced other stressors.

The employing establishment responded and stated that appellant's position description was a recreation therapist, that he was provided with a program support clerk beginning June 10, 2007 and that this employee continued to work as a scribe for appellant. Appellant's supervisor stated that appellant was fulfilling the duties of his position in a timely manner with no stress factors to her knowledge.

In a letter dated September 19, 2008, the Office requested additional factual and medical information in support of appellant's claim. The employing establishment submitted an e-mail noting that funds for a program clerk to act as a reader/scribe for appellant were approved by April 25, 2007.

Appellant responded and stated that in April 2007 he was transferred to the substance abuse treatment unit, but not provided with a copy of the rules and regulations. He stated that he was criticized for playing cards with the patients as this activity was against the rules. Appellant requested a copy of the rules on two occasions and was concerned that he would be terminated because he did not have the rules. He stated that as part of his reasonable accommodations the employing establishment was to provide him with a scribe. Appellant noted that he had received a scribe, but objected to the scribe performing duties other than working exclusively for him. He stated that his progress notes were required to be placed within a patient's chart within 24 hours of his evaluation. Appellant noted that his dictation had been late and that this caused him significant stress because he could be cited for not completing his work on time. He noted in July 2008 he was assigned to work on Sundays while his scribe was not. Appellant noted that he had to dictate his progress notes and wait for the scribe to complete them. He stated, "Because I work on Sunday, I am off on Monday and when I come back Tuesday morning, technically my progress notes and charting are late because they haven't been transcribed, reviewed by me and placed in the chart within 24 hours." Appellant noted that he was afraid that the employing establishment would use this violation of the rules as an excuse to fire him. He noted that he was not provided with a back-up scribe when his scribe was unavailable. Appellant noted that his scribe used three days of leave in July 2008, he had no one to do his work, his notes were late and he was afraid that he would be terminated. He stated that when his scribe was not available he could not retrieve his e-mail. Appellant stated that on several occasions his dictated treatment plans were not typed into his workbook and were not available for the team meeting which caused him stress and tension. He noted that the employing establishment was required to put on tape all relevant policies and procedures and had done so, but had not provided an index for the tapes. Appellant stated that the way policies and procedures were taped was of no help and did not aid him with his learning disabilities.

In a statement dated September 24, 2008, appellant's supervisor, Jennifer Koehler, stated that appellant was performing satisfactorily and that with the assistance of his scribe had been conducting recreation therapy screens, assessments, conduction leisure education groups and

facilitation recreation experience programs. She stated that appellant had not informed her of stresses occurring during his workday.

In a letter dated October 17, 2008, the employing establishment stated that a coworker dictated the policies and procedures appellant needed to do his job onto tapes and created an index in large print and a binder with all the individual policies in hard copy. It stated that appellant was assigned to work every other Sunday and was never counseled about late notes. Appellant's supervisor informed appellant that in the absence of his scribe he was expected to dictate his notes but would not be held accountable if his scribe was not available to transcribe the notes until she had returned to duty. Appellant's scribe requested additional duties as she did not have enough to do working exclusively for appellant and additional duties were approved. Appellant's supervisor did not find that appellant's treatment notes were untimely. The employing establishment noted that no action was taken against appellant for infractions of policies, procedures or untimeliness of treatment team notes.

Dr. Kelly Anne Spratt, an osteopath, completed a note on May 5, 2007 and stated that appellant was experiencing a lot more stress at work, but doing well.

By decision dated December 11, 2008, the Office denied appellant's claim for an emotional condition finding that he failed to substantiate a compensable factor of employment. Appellant, through his attorney, requested an oral hearing. He submitted additional medical evidence including a report dated December 15, 2008 from Dr. Samuel A. Bobrow, a psychologist, noting that appellant has a learning disability affecting his ability to read and write and short-term memory difficulties as well as bilateral hearing loss. Dr. Bobrow reported appellant's statements that in the early 1990s the employing establishment fired him, that appellant sued to get his job back and that he was charged with insurance fraud. Appellant was found not guilty in court and was able to get his job back in 1996. Dr. Bobrow noted appellant's statement's regarding his alleged work stressors. He opined that appellant's stress was such that with psychiatric support and medication he was unable to continue working.

Appellant testified at the oral hearing on May 18, 2009 regarding his learning disabilities. He stated that the employing establishment terminated his employment in June 1992 for failure to carry out the functions of his job. Appellant returned to work in 1996 and eventually received a scribe and worked in several different units from 1997 through 2000. Appellant was then placed on administrative leave in 2000 and charged with insurance fraud. The case was dismissed and appellant was reinstated in 2002. The employing establishment eventually hired a scribe in November 2006. However appellant's scribe did not work weekends. He also noted that his supervisor began using his scribe as her personal secretary and to work for another therapist resulting in a delay in appellant's dictation. Appellant stated that he never received tapes of employing establishment policies or procedures and did not receive tapes of meetings. He stated that his condition deteriorated in 2008 and his physicians increased his medication. Appellant stopped work on August 4, 2008 on his physicians' recommendation. The employing establishment terminated his employment on January 20, 2009.

The employing establishment responded on June 19, 2009 and stated that the reasonable accommodation committee along with appellant and his attorney agreed that additional time would be granted for appellant's work to be completed. The employing establishment provided

a copy of the recommendations of the reasonable accommodation committee meeting on March 27, 2007 which included a scribe and reader, hard copies of the policies which the reader will present orally to appellant and a reasonable extension of time by his supervisor for documentation. Appellant and his attorney were present during the meeting.

By decision dated July 28, 2009, the Branch of Hearings and Review affirmed the Office's December 11, 2008 decision finding that appellant had not established a compensable factor of employment as causing or contributing to his diagnosed emotional condition.

Counsel requested reconsideration on August 13, 2009 and stated that appellant was not given sufficient time to complete his assignments and appellant became stressed as a result in his inability to complete his work in a timely fashion. Appellant responded to the employing establishment in a statement received on August 18, 2009 and stated that the employing establishment failed to provide him with individual written assurance that he would not be disciplined if his documentation was late. He stated that his scribe was not available when he needed her as he was not given a priority for her time. Appellant stated that the employing establishment purchased a tone-indexed recorder, but failed to use this equipment to record the policies and procedures for appellant. He submitted a deposition regarding the charges from the employing establishment that he was submitting altered prescriptions in order to receive two payments. Appellant submitted a deposition from Gary Devansky regarding the fraud charges.

By decision dated September 4, 2009, the Office reviewed the merits of appellant's claim and denied modification of the prior decisions.

Appellant's attorney requested reconsideration on December 1, 2009 and submitted additional evidence. He alleged that all the requirements of the 2007 reasonable accommodations were not met by the employing establishment. Appellant submitted transcripts of a Merit Systems Protection Board hearing before Judge Michael T. Rudisill. He testified that he participated in the reasonable accommodation meeting and was satisfied with the accommodations, but was not provided with the accommodations agreed to by the employing establishment. Judge Rudisill noted that the policies of the employing establishment were given to his scribe and she taped them, but not in accordance with appellant's wishes. Appellant objected to the method and alleged that it would take an inordinate amount of time to determine when one policy ended and another began. He stated that he stopped working because his supervisors refused to give him written statements that he would not be held accountable for delays. On cross examination appellant stated that he was never disciplined or sanctioned for failing to meet time requirements. He stated that he was reprimanded for violating a policy during the period November 2007 through August 2008. Appellant submitted testimony from Dr. Bobeck repeating the findings of his report. Dr. Bobeck noted that it was appellant's belief and expectation that he was being set up to be fired.

Appellant also submitted testimony from employing establishment supervisors and appellant's scribe.[1] His scribe testified that she recorded the policies for appellant, created a list and put the policies in a notebook. Appellant's supervisor, Ms. Koehler testified that appellant became active as a therapist in November 2007, that once he began working on weekends appellant became concerned about whether his chart notes would be timely, but that she assured him that he would not receive disciplinary action if a chart note was untimely.

In a letter dated December 21, 2009, the employing establishment noted that Judge Rudisill determined that appellant was removed for cause and that there was no evidence of handicap discrimination. It included a copy of Judge Rudisill's decision dated October 2, 2009. Judge Rudisill found that the employing establishment did reasonably accommodate appellant's learning disabilities by providing a scribe and recording agency policies for appellant. He found that appellant was rebuked for giving patients playing cards and not formally disciplined.

By decision dated February 16, 2010, the Office reviewed the merits of appellant's claim and denied modification of its prior decisions.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) medical evidence establishing that he has an emotional or stress-related 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 stress-related condition.[2] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.[3] 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.[4]

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*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[6]

[1] The pages of the transcript are not in order in the record. Helen Reitman's testimony begins on page 7 of the transcript; Mr. Devansky's testimony begins on page 38 of the transcript; Donna A. Primen's testimony begins on page 82 of the transcript, Irene C. Melvin's testimony begins on page 96 of the transcript; Ms. Koehler's testimony begins on page 109 of the transcript, Nicholas Vitto testifies beginning on page 144, Sandra F. Simmon's testimony begins on page 170, Dr. Bobrow testifies beginning on page 201 of the transcript and appellant's testimony begins on page 223.

[2] *Leslie C. Moore*, 52 ECAB 132 (2000).

[3] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[4] *Id.*

[5] 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[7] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an 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 or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[8] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[9]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[10] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[11]

ANALYSIS

Appellant had alleged that he developed an emotional condition due to the failure of the employing establishment to comply with a reasonable accommodation agreement reached in 2007. He has submitted medical evidence substantiating a diagnosis of stress. Appellant attributed his condition to the employing establishment's failure to comply with his reasonable accommodations due to his learning disabilities and hearing loss.

Appellant alleged that the employing establishment failed to provide him with an exclusive scribe to transcribe his chart notes and read his e-mail. The record establishes that the employing establishment hired a scribe for appellant in 2007 in accordance with the reasonable accommodation agreement. Appellant alleged that his scribe performed other duties and was not exclusively available to him to transcribe his work when he completed his notes. The Board finds that this allegation relates to an administrative function of the employing establishment and that appellant must establish error or abuse on the part of the employing establishment to establish a compensable factor of employment. Appellant has submitted no evidence substantiating that the employing establishment failed to provide him with a scribe and there is no evidence that the employing establishment's action in providing additional duties for that

[7] *See Robert W. Johns*, 51 ECAB 136 (1999).

[8] *Lillian Cutler, supra* note 5.

[9] *Roger Williams*, 52 ECAB 468 (2001).

[10] *Charles D. Edwards*, 55 ECAB 258 (2004).

[11] *Kim Nguyen*, 53 ECAB 127 (2001). *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

scribe resulted in error or abuse.[12] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[13] The Board finds that the employing establishment provided appellant a reasonable accommodation in accordance with the written agreement and that there is no evidence that the employing establishment acted unreasonably in assigning additional duties to appellant's scribe.

Appellant also attributed his emotional condition to the fact that he worked on weekends while his scribe did not and that the employing establishment did not provide him with a back-up scribe should his scribe use leave. He has not submitted any evidence that he was reprimanded for failing to complete his work in a timely manner or that he suffered any adverse consequences due to his scribe's absences from work. Appellant has alleged that he was afraid that the employing establishment would fire him due to these delays. The Board has held that the fear of losing one's job or job insecurity is not sufficient to constitute a personal injury in the performance of duty.[14] Appellant has not met his burden of proof in establishing a compensable factor of employment in this regard.

Appellant also attributed his emotional condition to the employing establishment's failure to provide him with the policies and procedures that applied to his position. He noted that the employing establishment was required to put on tape all relevant policies and procedures. Appellant noted that his scribe had taped the relevant employing establishment policies, but objected to the manner in which she had done so. His scribe stated that she recorded the policies and provided appellant with an index as well as an enlarged hard copy of the information. The Board finds that this is also an administrative matter and that appellant has not established that the employing establishment acted unreasonably in recording the policies and establishing an index as appellant was provided with a scribe to read and locate the information for him. Appellant has not established error or abuse and has not established a compensable factor of employment. Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.[15]

On appeal appellant's attorney has alleged that appellant has established a compensable factor of employment. As noted above, the Board has considered all the evidence of record and disagrees with this assessment. The Board further finds that appellant has filed a new occupational disease claim based on new alleged factors of employment arising after 2007, due to the nature of his claim, the Board does not find it necessary to direct the Office to combine appellant's emotional condition claims.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to substantiate a compensable factor of employment.

[12] *M.D.*, 59 ECAB 211 (2007).

[13] *Id.*

[14] *Pervis Nettles*, 45 ECAB 623, 628 (1993).

[15] *A.K.*, 58 ECAB 119 (2006).

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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