

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVE R. LABONTE and DEPARTMENT OF VETERANS AFFAIRS,  
JERRY L. PETTIS MEMORIAL VETERANS MEDICAL CENTER,  
Loma Linda, Calif.

*Docket No. 97-1280; Submitted on the Record;  
Issued January 21, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty as alleged.

On December 28, 1995 appellant, then a 53-year-old electronics mechanic, filed a claim alleging that he sustained an emotional "stress" condition in the performance of duty on or before December 16, 1995. Appellant attributed his condition to the December 1995 to January 1996 furlough of federal employees, not being paid during the furlough and watching news broadcasts concerning the furlough.<sup>1</sup>

By decision dated February 21, 1996, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he submitted no medical evidence, and did not allege any compensable factors of employment. Appellant disagreed with this decision, and requested a hearing, held October 24, 1996.

At the hearing, and in a May 20, 1996 statement, appellant also attributed the claimed emotional condition to disciplinary actions by his supervisor, Eugene R. Annis, including a November 8, 1989 letter of counseling for being away from his work site without authorization, a reprimand regarding use of leave on November 5, 1990, a May 25, 1994 letter of counseling for failing to inform Mr. Annis of an audiology appointment, a December 13, 1995 investigation as to why AMSCAR units were not repaired and March and August 1996 letters of counseling. Appellant also alleged that Mr. Annis' denial of a request for annual leave on September 18, 1996 and denial of a June 19, 1995 request for a compressed work schedule contributed to his emotional stress. Appellant also alleged that a February 1995 change in job duties from

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<sup>1</sup> The employing establishment controverted appellant's claim, stating that the federal budget controversy did not adversely affect appellant's work environment, and that appellant was not affected differently than any other employee.

primarily repairing sterilizers to maintenance of the AMSCAR automated robotic delivery vehicle system was stressful, as the system was in disrepair, he was not given adequate training or support until June 1996, was made to work two jobs such that coworkers remarked about his overtime schedule, and that the employing establishment improperly contracted out the sterilizer repair duties. Appellant also asserted a general pattern of harassment and retaliation due to his position as union steward and safety officer,<sup>2</sup> including being given a lower performance rating on April 10, 1987,<sup>3</sup> harassment over filing a compensation claim, denial of proper union representation during a downsizing that his performance standards were improperly vague and that his vehicle was vandalized in the employing establishment lot and he was not reimbursed for the cost of repairs

Appellant also alleged that his condition was due to a September 10, 1996 incident in which Mr. Annis yelled at appellant about repair of AMSCAR units, made a fist at him and said he would like to hit appellant, put his hands on appellant and knocked him down. He submitted evidence related to this incident.<sup>4</sup>

In a September 10, 1996 statement, Mr. Annis stated that he spoke to appellant that morning between 10:30 a.m. and 11:00 a.m. regarding why the AMSCAR units were not working in elevators. Mr. Annis said that while he suggested solutions to appellant, appellant accused him of harassment and not ordering necessary parts. He stated that he urged appellant to be patient and that the system would most likely be replaced in a year. Mr. Annis then requested that appellant clean up the work area, and put covers on AMSCARS not being worked on. Appellant allegedly refused and told Mr. Annis to leave, and allegedly shoved Mr. Annis. Mr. Annis then recalled putting his hands on appellant to steady himself, but ended up falling while holding on to appellant. He stated that when he got up, he made a fist at appellant.

In a September 29, 1996 statement, one of appellant's coworkers stated that between 10:30 a.m. and 11:00 a.m. on September 10, 1996, he heard a loud voice screaming obscenities and threats in appellant's shop, and that the voice was not appellant's. In an undated statement, appellant alleged that on September 10, 1996, Mr. Annis yelled at him and assaulted him over a 30-minute period. In an October 30, 1996 employing establishment investigative memorandum, an employing establishment official noted that between 10:30 a.m. and 11:00 a.m. on September 10, 1996, there was a confrontation between Mr. Annis and appellant, that Mr. Annis yelled at appellant, made a fist at him, grabbed appellant near the throat, fell down while holding appellant, and that appellant's arm was cut and his watchband broken in the fall.

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<sup>2</sup> The record contains an October 26, 1988 memorandum of understanding between the union and the employing establishment, in which the employing establishment agreed not to interfere with certain union activities.

<sup>3</sup> Appellant submitted documents relating to OSHA (Occupational Safety and Health Administration) violations at the employing establishment and remedial actions ordered related to ethylene oxide gas exposure and the need for appropriate safety glasses.

<sup>4</sup> The hearing representative emphasized the importance of submitting rationalized medical evidence explaining how and why the alleged employment factors would cause the claimed emotional condition. Appellant submitted 1996 laboratory and urology reports, chart notes detailing treatment of a skin rash thought to have been precipitated by antibiotics.

Following the hearing, the employing establishment submitted comments in response to the hearing transcript.

In an undated statement, Lawrence Dressel, the employing establishment's chief of maintenance and operations, explained that appellant was hired as a mechanic in 1983, classification WG-2604-11, with duties as a sterilizer repair mechanic and back-up mechanic on the AMSCAR system. Mr. Dressel noted that the WG-2604-11 classification applied to both sterilizer and AMSCAR duties, and that a 1988 desk audit found the classification appropriate. Mr. Dressel stated that the transfer of appellant's responsibilities from primarily sterilizer repair with back-up AMSCAR duties to primarily AMSCAR repair as under discussion for several years, actually reduced appellant's work load while better meeting the needs of the surgical service, and that appellant agreed to the transfer of responsibilities. To assist appellant and better fulfill the agency's mission, the employing establishment contracted out sterilizer repairs in April and June 1995, with prior notice to appellant, and no resultant job cuts. During appellant's transition, he was supported by all electrical shop workers, which supported appellant in both sterilizer and AMSCAR work, thus lightening his load. Although there were no major technology changes in the AMSCAR system that appellant had worked on since 1983, appellant and the electrical and electronics units were provided with 40 hours specialized AMSCAR training in June 1996, and a work-study intern was able to acquire sufficient expertise with AMSCAR in three months to assist appellant in trouble shooting system problems. Mr. Dressel asserted that the downsizing was handled fairly and equitably, and that letters of instruction and counseling were issued to appellant due to his genuine need to improve.

In a November 25, 1996 response, the employing establishment asserted that appellant was given appropriate time off to perform his duties as union steward, was rated highly successful with an award in 1994 and 1995, fully successful in 1992, 1993 and 1996, and given appropriate tools, parts and support to perform his duties. The employing establishment stated that appellant was informed in December 1994 that the AMSCAR mechanic, who worked in the same shop, would retire in February 1995. In October 1995 all of the 14 new or rebuilt sterilizers were put under a maintenance contract to relieve appellant of sterilizer responsibilities while he learned the AMSCAR system, with no additional duties while in transition.

By decision dated and finalized January 3, 1997, the Office hearing representative affirmed the February 21, 1996 decision denying appellant's claim on the grounds that he failed to submit medical evidence establishing that he sustained an emotional condition, and had not alleged any compensable factors of employment. The hearing representative found that appellant had failed to establish his allegations of harassment, that he was forced to perform two jobs or was otherwise overworked, or that he received insufficient performance ratings or other recognition for his work. The hearing representative further found that appellant failed to demonstrate any error or abuse by the employing establishment that would bring the alleged administrative and personnel matters under coverage of the Federal Employees' Compensation Act.

The Boards finds that appellant has not established that he sustained an emotional condition in the performance of duty as alleged.

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his conditions; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>5</sup> Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.<sup>6</sup>

When an employee experiences an emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.<sup>7</sup> Disabling conditions resulting from an employee's feeling of job insecurity, such as fear of a reduction-in-force or furlough, or the desire for a different job, as in this case, do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.<sup>8</sup> In these cases such feelings are considered to be self-generated by the employee as they arise in situations not related to his or her assigned duties. Perceptions and feelings alone are not compensable.

In this case, appellant attributed his emotional condition to several factors not in the performance of duty. Appellant's emotional reaction, attributed to the transfer of duties from primarily sterilizer work with AMSCAR back-up, to primarily AMSCAR maintenance, and his desire for a different work schedule, result from his desire to work within a particular environment and from his frustration over changes within the work environment. This frustration is not compensable.<sup>9</sup> With regard to annual ratings, the Board has held that reactions to assessment of performance are not covered under the Act.<sup>10</sup> Disciplinary matters, including the letters of instruction and counseling, and the December 1995 investigation, pertain to actions taken in an administrative capacity and are not compensable under the Act unless it is demonstrated that the employing establishment has erred or acted abusively in its administrative

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<sup>5</sup> See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>6</sup> *Id.*

<sup>7</sup> *Donna Faye Cardwell*, *supra* note 5; *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>8</sup> *Raymond S. Cordova*, 32 ECAB 1005 (1981); *Lillian Cutler*, *supra* note 7.

<sup>9</sup> See *Donald E. Ewals*, 45 ECAB 111 (1993); *David W. Shirey*, 42 ECAB 783 (1991).

<sup>10</sup> *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); see also *Effie O. Morris*, 44 ECAB 470 (1993).

capacity.<sup>11</sup> No such error or abuse has been demonstrated in this case. Similarly, the disputes over leave usage are not compensable under the Act.<sup>12</sup> Appellant's allegations concerning lack of adequate training and support are not substantiated by the record. The statements of Mr. Dressel and the employing establishment indicate that appellant was provided with appropriate training and support throughout the transition period, and that appellant had in fact worked on the AMSCAR system since he was hired in 1983.

Also, appellant did not substantiate his allegations of a general pattern of harassment or retaliation. Actions of an employee's supervisor which the employee characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.<sup>13</sup> Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.<sup>14</sup> An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.<sup>15</sup> To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.<sup>16</sup> The Board finds that appellant has not submitted sufficient evidence in support of his allegations to establish harassment.

However, the Board finds that appellant has alleged a compensable factor of employment, the September 10, 1996 altercation, and in that regard modifies the January 3, 1997 decision. The interaction between appellant and Mr. Annis arose in the course of his employment, that is, at a time when he was engaged in his master's business, at a place where he was expected to be in connection with his employment, and while he was fulfilling the duties of his employment or engaged in doing something incidental thereto.<sup>17</sup> Physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award of compensation if the medical evidence establishes that a condition was thereby caused or aggravated.<sup>18</sup> The record contains corroborating statements from Mr. Annis, the employing

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<sup>11</sup> *Joe E. Hendricks*, 43 ECAB 850 (1992).

<sup>12</sup> *Anthony A. Zarcone*, 44 ECAB 751 (1993).

<sup>13</sup> *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

<sup>14</sup> *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

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

<sup>16</sup> *See Anthony A. Zarcone*, *supra* note 12; *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>17</sup> *Josie P. Waters*, 45 ECAB 513 (1994); *Monica M. Lenart*, 44 ECAB 772 (1993).

<sup>18</sup> *Alton L. White*, 42 ECAB 666 (1991); *Cf. Constance G. Patterson*, 41 ECAB 206 (1989). The employee alleged that a coworker poked her twice, causing her to jump and resulting in neck pain and headache. The Board held that the question of whether the coworker intentionally poked the employee was irrelevant because the issue before the Board -- whether the employee sustained an injury in the performance of duty -- required no determination of intent. The Board found that the employee sustained an injury at the time, place and in the manner alleged, and remanded for a determination of resulting disability, if any. However, due to the lack of medical evidence in this case, no further development is warranted at this time.

establishment and a coworker largely substantiating appellant's account of the events of September 10, 1996. However, as appellant did not submit any medical evidence addressing the September 10, 1996 incident, he has not established that the altercation, or any other employment factor, caused or aggravated any medical condition.

Consequently, appellant has not established that he sustained an emotional condition in the performance of duty as he submitted no rationalized medical evidence explaining how and why the alleged factors of his federal employment would cause or aggravate any medical condition.

The decision of the Office of Workers' Compensation Programs dated January 3, 1997 is hereby affirmed as modified.

Dated, Washington, D.C.  
January 21, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member