

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID PEREZ and DEPARTMENT OF VETERANS AFFAIRS,
AUDIE MURPHY VETERANS ADMINISTRATION HOSPITAL,
San Antonio, Tex.

*Docket No. 98-684; Oral Argument Held December 10, 1998;
Issued July 12, 1999*

Appearances: *Patrick E. Zembower*, for appellant; *Miriam D. Ozur, Esq.* for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

In April 1996 appellant claimed that he sustained an emotional condition due to various alleged incidents and conditions at work, including acts of harassment and discrimination committed by supervisors and coworkers striving to successfully perform his duties which required a high degree of technical knowledge and concentration, being given conflicting instructions from different supervisors regarding his duties, being assigned to a job in the electronics department, for which he was not qualified,¹ being unable to perform his duties as a foreman because the employees working under him would not follow his instructions and upper management would not assist him,² and being placed in absent without leave (AWOL) status.

Appellant submitted medical reports which described the treatment of his emotional

¹ In statements dated May 23, 1996 and June 13, 1997, the employing establishment acknowledged that appellant had no knowledge or experience in electronics when he was assigned to that department but stated that he worked closely with an electronics technician and was able to perform his tasks. In his various statements and at the oral hearing held in this case, appellant disputed the claims of the employing establishment that he was not required to perform tasks for which he was not qualified.

² Appellant provided a description of his various job requirements and responsibilities and he also presented testimony regarding his duties at the oral hearing. He testified at length concerning his duties when he was assigned to the electronics department from approximately January through April 1996 and stated that he was qualified to perform work as an electrician but not trained to perform his tasks in the electronics department and the employing establishment did not provide him with training.

condition. In a disability certificate dated April 30, 1996, Dr. Robert L. Jimenez, a Board-certified psychiatrist, indicated that appellant was totally disabled from April 30 through May 30, 1996 due to emotional decompensation and stated that appellant was unable to handle his current job at that time and would need a transfer from his current stress-laden environment. In a report dated April 30, 1996, Dr. Jimenez related that appellant complained of ethnic discrimination at work. He also related that the employees appellant supervised refused to follow his orders and Dr. Jimenez eventually resigned his supervisory position because he was unable to perform his duties without the cooperation of these workers. Dr. Jimenez provided the results of a mental status examination and diagnosed dysthymic disorder and overanxious disorder. He stated his opinion that appellant clearly had anxiety and depression associated with the job stressors he had described. In a report dated May 21, 1996, Dr. Jimenez related appellant's allegation that, when he was performing his duties as a foreman, the workers he supervised would not carry out his instructions and caused him stress because he was unable to successfully perform his supervisory duties. In a report dated October 12, 1996, Dr. Jimenez related appellant's allegation that he had been promoted to remove him from his position of authority in the union and that individuals at the employing establishment were conspiring to get him fired. He indicated that appellant's condition had worsened and he was totally disabled. Dr. Jimenez diagnosed major depressive disorder, single episode, nonpsychotic and panic disorder with agoraphobia. In a report dated November 27, 1996, Dr. Jimenez related that appellant was able to return to full-duty status but that he was likely to suffer some incapacitation if he was required to perform very complex tasks for which he was not trained and had no experience. Also, at the oral hearing held in this case, Dr. Jimenez testified that among the factors which he felt had contributed to appellant's emotional condition was his inability to perform tasks assigned to him for which he was not qualified.

By decision dated July 1, 1996, the Office of Workers' Compensation Programs denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that the claimed emotional condition occurred in the performance of duty. By letter dated July 25, 1996, appellant requested an oral hearing before an Office hearing representative. On May 20, 1997 a hearing was held before an Office hearing representative at which time appellant testified. By decision dated August 21, 1997, the Office hearing representative denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that appellant had sustained an emotional condition as a result of compensable factors of employment. In his decision, the Office hearing representative addressed appellant's allegations of harassment, being required to perform tasks, for which he was not qualified and being placed in AWOL status and either found that the factors were not compensable under the Federal Employees' Compensation Act or there was insufficient evidence of record to support the allegations. By letter dated October 20, 1997, appellant requested a new hearing alleging false statements provided by the employing establishment. By decision dated November 19, 1997, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that he had already received one oral hearing and was, therefore, not, as a matter of right, entitled to another review by the Branch of Hearings and Review. The Branch of Hearings and Review noted that it had considered appellant's request for a second oral hearing and had determined that his request could equally well be addressed by requesting reconsideration and submitting additional evidence.

The Board finds that this case is not in posture for a decision.

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 Act.³ 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.⁴

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.⁵ 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.⁶

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegation that harassment and discrimination on the part of his supervisors and coworkers with respect to his ethnic background contributed to his claimed stress-related condition, 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.⁷ 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.⁸ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.⁹ Thus, appellant has not established a compensable employment factor under the Act in this respect.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387, 393 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

⁶ See *Margaret S. Krzycki*, *supra* note 5.

⁷ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁸ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁹ 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).

Regarding appellant's allegation that the employing establishment unfairly placed him on AWOL status, the Board finds that this allegation is related to administrative or personnel matters, unrelated to appellant's regular or specially assigned work duties and does not fall within coverage of the Act.¹⁰ However, the Board has also held that an administrative or personnel matter will be considered to be a compensable employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹¹ In this case, appellant has submitted insufficient evidence to establish that the employing establishment erred or acted abusively in placing him on AWOL status and, therefore, this factor is not deemed a compensable factor of employment.

Regarding appellant's allegation that he experienced difficulties in performing his regular and specially assigned duties, the Board has held that emotional reactions to situations, in which an employee is trying to meet his or her position requirements are compensable. In *Joseph A. Antal*,¹² a tax examiner filed a claim alleging that his emotional condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Cutler*,¹³ found that the claimant was entitled to compensation. In *Georgia F. Kennedy*,¹⁴ the Board, citing the principles of *Cutler*, listed employment factors which would be covered under the Act, including heavy work load and imposition of unreasonable deadlines.

In this case, appellant alleged that he sustained his emotional condition because he was striving to successfully perform his duties but was experiencing difficulties because he received conflicting instructions from supervisors, because employees under his supervision would not follow his instructions and the employing establishment would not assist him in dealing with these employees and because he was assigned, for a time, to a job in the electronics department for which he was not qualified. The Board finds that appellant has submitted sufficient evidence to establish that he experienced problems in attempting to perform his duties and, therefore, he has established a compensable factor of employment. The medical evidence of record tends to support appellant's claim that this factor contributed to his emotional condition but the reports are insufficient to establish appellant's entitlement to compensation. While appellant's attending Board-certified psychiatrist, Dr. Jimenez, briefly described some of appellant's difficulties in performing his duties, he provided insufficient medical rationale explaining the relationship between appellant's symptoms and specific factors of employment. The Board finds, however, that the medical evidence is sufficiently supportive of appellant's claim that further development is warranted.¹⁵

As appellant has identified a compensable factor of employment with respect to the performance of his regular and specially assigned duties, the Office should prepare a statement of accepted facts detailing the accepted compensable employment factor as well as those incidents and conditions which are not accepted as compensable employment factors. The Office should then refer appellant and the case record, including the statement of accepted facts, to an appropriate medical specialist for examination and an opinion on whether he sustained an emotional condition due to his employment. After such further development as deemed necessary, the Office should

¹⁰ See *Michael Thomas PLante*, 44 ECAB 510, 516 (1993).

¹¹ *Id.*

¹² 34 ECAB 608 (1983).

¹³ See *supra* note 4.

¹⁴ 35 ECAB 1151 (1984).

¹⁵ *John J. Carlone*, 41 ECAB 354, 358 (1989).

issue an appropriate decision on this matter.¹⁶

The decision of the Office of Workers' Compensation Programs dated August 21, 1997 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.¹⁷

Dated, Washington, D.C.
July 12, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁶ See *Donna J. DiBernardo*, 47 ECAB 700, 705 (1996).

¹⁷ Given the Board's disposition of the merit issue in this case, it is not necessary for the Board to consider the nonmerit issue of whether the Office, by decision dated November 19, 1997, properly denied appellant's request for an oral hearing.