

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRENCE R. ACCOO and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Leesburg, Va.

*Docket No. 97-1426; Submitted on the Record;
Issued March 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are whether appellant established that he sustained an emotional condition in the performance of duty and whether he abandoned his request for an oral hearing.

On January 18, 1996 appellant, then a 35-year-old air traffic controller, filed a notice of traumatic injury, claiming that his mental stress and "emotional anguish" were caused by being informed that he was responsible for a near mid-air collision. The employing establishment controverted the claim, stating that appellant was removed from his operational position pending investigation of a potential error on January 13, 1996 and that the aircraft involved were in no danger of colliding.

On March 26, 1996 the Office requested further factual information from appellant. Appellant responded by describing the January 13, 1996 incident in which two planes passed within only 3.75 miles laterally and 1,500 feet vertically of each other while under his control.¹

An initial investigation that day attributed the blame for this situation to controllers in Atlanta, Georgia. However, on January 18, 1996 appellant was informed of his removal from operational duties because of deficiencies in his performance in handling the two aircraft on January 13, 1996. Appellant was told that he was decertified and would be required to complete remedial training.

Appellant stated in his response that he was "two-thirds of the way to potential unemployment," explaining that he experienced a similar incident recently and that if a controller is involved in 3 such erroneous situations within 30 months, he may be subjected to disciplinary or adverse action. Appellant added that operational errors were "very serious, stressful, traumatic and hard to forget."

¹ FAA Order 7110.65 defines the minimum separation between aircraft in the air as five miles laterally and 2,000 feet vertically.

On May 20, 1996 the Office denied the claim on the grounds that appellant had failed to establish that his emotional condition was sustained in the performance of duty. The Office found that neither removal from duty nor the effect of an operational error on job performance was a compensable work factor.

On December 7, 1996 the Office informed appellant that an oral hearing would be held on Wednesday, January 7, 1998. On January 27, 1997 the Office found that appellant had abandoned his request for a hearing because he failed to appear on January 7, 1997 and had not, within 10 days, shown good cause for his failure to attend.

The Board finds that appellant has failed to meet his burden of proof in establishing that his mental stress and emotional anguish were caused by compensable work factors.

Under the Federal Employees' Compensation Act,² appellant 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 factors of his federal employment. To establish that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) 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.³

Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.⁴ There are distinctions regarding the type of work situation giving rise to an emotional condition that will be covered under the Act.

For example, disability resulting from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employing establishment is covered.⁵ However, an employee's emotional reaction to an administrative or personnel matter is generally not covered,⁶ and disabling conditions caused by an employee's fear of termination or frustration from lack of promotion are not compensable. In such cases, the employee's feelings are self-generated in that they are not related to assigned duties.⁷

Nonetheless, if the evidence demonstrates that the employing establishment erred or acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.⁸ However, a

² 5 U.S.C. §§ 8101-8193.

³ *Vaile F. Walders*, 46 ECAB 822, 825 (1995).

⁴ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁵ *Jose L. Gonzalez-Garced*, 46 ECAB 559, 563 (1995).

⁶ *Sharon J. McIntosh*, 47 ECAB 754 (1996).

⁷ *Barbara E. Hamm*, 45 ECAB 843, 850 (1994).

⁸ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

claimant must support his allegations with probative and reliable evidence; personal perceptions alone are insufficient to establish an employment-related emotional condition.⁹

The initial question is whether appellant has alleged compensable employment factors as contributing to his condition.¹⁰ Thus, part of appellant's burden of proof includes the submission of a detailed description of the specific employment factors or incidents which appellant believes caused or adversely affected the condition for which he claims compensation.¹¹ If appellant's allegations are not supported by probative and reliable evidence, it is unnecessary to address the medical evidence.¹²

In this case, appellant is not claiming that his stress was caused by the January 13, 1996 incident, which would be considered part of his regularly assigned duties. Rather, he alleges that his stress was caused by his removal from duty pending an investigation and remedial training and by the effect such action would have on his job performance.

An emotional condition sustained during an investigation into erroneous or improper actions by an employee is not within the performance of duty because the employing establishment retains the right to conduct investigations as part of an evaluation process or inquiry into suspected wrongdoing.¹³ Although such investigation is generally related to appellant's employment, it constitutes an administrative function of the employer and is not a regularly or specially assigned duty of the employee.¹⁴ Similarly, removing an employee from his duties or requiring him to undergo retraining are part of management's responsibilities and, absent evidence of error or abuse, will not be covered under the Act.¹⁵

In this case, appellant has not submitted any evidence that the employing establishment erred or acted abusively or unreasonably in informing him on February 1, 1996 of certain deficiencies in his handling of the January 13, 1996 incident and ordering him to take remedial training before being recertified. Nor does appellant allege that his supervisor acted in an erroneous or abusive fashion. Therefore, the Board finds that appellant's reaction to his supervisor's personnel decision is not a compensable work factor.

Appellant's apprehension that he might be removed from his federal job because of two operational errors is also not a compensable work factor. Emotional conditions resulting from an employee's feelings of job insecurity are self-generated and thus are not caused by work factors. Therefore, the Board finds that, in the absence of any record evidence of error or abuse,

⁹ *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

¹⁰ *Wanda G. Bailey*, 45 ECAB 835, 838 (1994).

¹¹ *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

¹² *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

¹³ *Larry J. Thomas*, 44 ECAB 291, 300 (1992).

¹⁴ *Drew A. Weissmuller*, 43 ECAB 745, 752 (1992).

¹⁵ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

appellant's fear of poor performance and job loss is not covered under the Act. Inasmuch as appellant has not established any compensable work factors under the Act, the Board need not consider the medical evidence.¹⁶

The Board also finds that the Office's January 27, 1997 decision, regarding appellant's request for a hearing is null and void.

The Act¹⁷ is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.¹⁸ The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.¹⁹ Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such a hearing as a matter of right unless his or her request is made within the requisite 30 days.²⁰

The Board has held that the only limitation on the Office's authority is reasonableness,²¹ and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.²²

In this case, the record contains no request for an oral hearing from appellant. His April 5, 1996 response to the Office's March 26, 1996 letter requesting further information on his claim indicated that he was "now ready to proceed directly to a hearing, should any further delays be anticipated." Appellant added that the Office could contact him should any further information be needed "prior to a hearing."

However, the right to an oral hearing follows a final decision of the Office and the Office's decision denying appellant's claim was dated May 20, 1996. Appellant's April 5, 1996 letter predates the decision and therefore cannot be considered a proper request for an oral hearing.²³

¹⁶ See *Dinna M. Ramirez*, 48 ECAB ____ (Docket No. 94-2062, issued January 17, 1997) (finding that the Board need not consider psychiatric evidence because appellant failed to establish that the employing establishment acted abusively in denying her request for official time).

¹⁷ 5 U.S.C. §§ 8101-8193.

¹⁸ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ____ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

¹⁹ *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

²⁰ *William F. Osborne*, 46 ECAB 198, 202 (1994).

²¹ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

²² *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

²³ See 20 C.F.R. § 10.131(a).

Inasmuch as appellant has not properly requested an oral hearing, the Office's notice of a hearing scheduled for January 7, 1998 is moot and the Office's decision finding that appellant abandoned his request for an oral hearing is a nullity.

The January 27, 1997 decision of the Office of Workers' Compensation Programs is voided and the May 20, 1996 decision is affirmed.

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member