

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VAUGHN A. SHIVERS and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, St. Louis, MO

*Docket No. 98-1094; Submitted on the Record;
Issued October 28, 1999*

DECISION and ORDER

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

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

Appellant filed a claim on March 5, 1992, alleging that he sustained a major affective disorder and depression causally related to his federal employment. Appellant indicated on the claim form that his condition was caused by racial discrimination, excessive scrutiny, misrepresentation of facts and retaliation. In a narrative statement dated May 2, 1994, appellant alleged that he was subject to harassment and discrimination, citing the following incidents: (1) in 1984, appellant worked as an intermittent taxpayer representative on an "on-call" basis and another employee was called in more often than appellant; (2) appellant was frequently passed over for promotion; (3) others with similar qualifications were hired at a higher grade level; (4) he was not given proper training by a Mr. Jewell and was targeted for career destruction; (5) the employing establishment required that appellant relocate at the minimum salary and grade for his position, although another employee was not required to relocate and was hired above the minimum salary; (6) the employing establishment disallowed a portion of his moving expenses; and (7) for the position appellant held in Kansas City, he was not given proper supervision or training.

In a statement dated December 13, 1996, appellant further alleged that he was subject to a hostile atmosphere that included racial comments by coworkers and supervisors, he was subject to retaliation for statements he made regarding lack of proper training, he was denied sick leave, offered a transfer to a position he was not qualified for, improperly placed on an "opportunity to improve period" for an extended period of time and his grievance was not properly processed.

In a decision dated May 3, 1993, the Office of Workers' Compensation Programs denied the claim on the grounds that appellant had not established an injury in the performance of duty. In a decision dated July 21, 1994, the Office denied modification of the denial of the claim.

By decision dated August 10, 1995, the Office had found that appellant's request for reconsideration was untimely and failed to show clear evidence of error. On appeal to the Board, the Director's motion to remand the case was granted and the case was returned to the Office for an appropriate decision on a timely reconsideration request.¹ In a decision dated April 4, 1996, the Office reviewed the case on its merits and denied modification of the denial of the claim. By decision dated April 28, 1997, the Office again denied modification.²

The Board has reviewed the record and finds that appellant has not established an emotional condition in the performance of duty.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of his federal employment.³ To establish his claim 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.⁴

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁵

In the present case, appellant has alleged harassment and racial discrimination as contributing to an emotional condition. He did not, however, support his allegations with

¹ Docket No. 95-2958.

² The memorandum accompanying the April 28, 1997 decision stated that the claim was vacated in part to accept "fact of injury," but the claim remained denied because none of the factors claimed were considered in the performance of duty. The term "fact of injury," as used by the Board, refers to both establishing a compensable factor of employment and a resulting injury. It is evident that the Office has not accepted an injury as occurring in the performance of duty in this case; the memorandum explained that the alleged factors of employment were not found to be in the performance of duty and the claim was denied. Since the Office explained the basis for the denial of the claim, the inappropriate reference to "fact of injury" is found to be harmless error.

³ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁴ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

probative evidence. The record indicates that appellant did file a complaint with the Equal Employment Opportunity Commission (EEOC) but there are no specific findings in the record.⁶ Moreover, appellant did not substantiate his allegations of harassment and discrimination with evidence corroborating his allegations. The Board is unable to find sufficient evidence to establish a claim based on harassment or discrimination in this case.

The Board notes that even if a pattern of discrimination or harassment is not established, a specific administrative action may be a compensable factor of employment if it is found to be erroneous or abusive.⁷ Appellant has alleged error in such administrative matters as being passed over for promotions, not being given adequate training and being denied sick leave. He did not, however, submit any probative evidence of error or abuse with respect to a specific administrative action by the employing establishment. For example, appellant submitted a memorandum dated April 23, 1990 from a supervisor, Mr. Jewell, stating that appellant's performance remained at an unacceptable level, but his "opportunity to improve" period would be extended another 90 days. Appellant stated that he was not given a fair opportunity to improve his performance and the opportunity period was improperly extended, but the record does not contain any probative evidence of error or abuse in this regard.

Accordingly, the Board finds that appellant has not established a claim based on harassment or discrimination, nor has he shown error or abuse in an administrative matter. Appellant has not substantiated a compensable factor of employment in this case. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.⁸

⁶ Appellant indicated in a July 15, 1995 request for reconsideration that the "EEOC case was not ruled in my favor," without further discussion.

⁷ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁸ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

The decision of the Office of Workers' Compensation Programs dated April 28, 1997 is affirmed.

Dated, Washington, D.C.
October 28, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member