

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK F. DRUMM, JR. and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Fort Collins, CO

*Docket No. 97-1316; Submitted on the Record;
Issued January 19, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim that he sustained an emotional condition while in the performance of his duties.

In a decision dated April 1, 1996, the Office rescinded its acceptance of appellant's claim on the grounds that the employment factors to which he attributed his condition were not in the performance of duty. A hearing representative reviewed the written record and affirmed the Office's rescission in a decision dated November 12, 1996.

The record contains a statement of accepted facts dated August 1987. Although the Office indicated that many of the incidents implicated by appellant were not compensable factors of employment, this statement shows that the Office accepted the following as compensable:¹

"In the spring of 1979, he began duties at the Arapaho National Recreation Area as an Outdoor Recreation Planner. Part of his duties involved law enforcement and public safety functions. In this regard, he determined that emergency oxygen supplies and radio equipment were required and he made requisitions. The requisitions for oxygen were denied. The employing establishment determined that this was not within the scope of their activities. Additional shipments of radio equipment were incomplete in his opinion. He complained to higher level radioman, who responded that the shipments were complete and shouted obscenities at him. This is a compensable factor.

¹ It appears that the Office first drafted a statement of accepted facts describing the factors implicated and later, as evidenced by the different font, appended short statements to each identifying these factors as compensable or not compensable.

“On July 2, 1980 he was called at home in the evening and told to clean out his office the next day and report to a different office, at Hot Sulphur Springs, CO, 28 miles away from his old office in Granby, CO. This is compensable.

“He was placed on AWOL [absent without leave] status. The employing establishment would not grant him annual leave because it was not requested in advance and denied his request for advanced sick leave, first because they required he obtain medical verification he was sick and then because they questioned the credentials of his therapist, a psychologist with an EdD degree. This is compensable.

“On June 11, 1985 he was confronted by his supervisor for arriving to work 10 minutes late. The same day, he was also given a letter of direction, controlling his use of work time because of time used at work talking on the [tele]phone to friends and others outside the official process about his lawsuit and numerous grievances against the Forest Service. On June 11, 1985 he felt light headed and passed out and was taken by ambulance to a hospital. He took time off June 12 through 13, 1985 because he was upset. From June 17 to 19, 1985, he was off work due to hemorrhoid surgery. When he returned to work, he requested a padded chair instead of the wooden chair he had previously chosen. The [employing establishment] never replied to his request in writing. However, a supervisor told him he could have a padded chair and the claimant took it. The supervisor told the claimant he would order a pad if the chair did not suit him. This is a compensable factor.

“On June 25, 1985 he was told his schedule was being changed, for him to arrive at 7:45 a.m., which necessitated him to leave from home at 6:15 a.m. He was also denied sick leave for June 12 and 13, 1985 because he had not gotten advance approval for sick leave. This is compensable.

“On the same day, he collided with his supervisor while rounding a corner in the hall. The supervisor accused him of trying to trip him. The claimant became upset and told the supervisor he was lying and that the supervisor hated him. He challenged the supervisor to ‘go outside and settle this.’ He then returned to his desk, flung a coffee cup and overturned his desk. He drove to Denver and was hospitalized June 24 through July 17, 1985. He never returned to work with the Forest Service. This is compensable.

“During the above time, fellow employees did not include him in lists circulated for invitations to parties and routing of work materials. In June 1984, a fellow employee told him he had been told to avoid the claimant or it would be bad for his career. Two employees at Idaho Springs told him they had been advised he was a ‘trouble-maker’ before he arrived at his reassignment. When he reported for duty, his mailbox was identified by his last name, while everyone else’s used the people’s first names. This is compensable.”

The Office prepared a notice of proposed termination and attached a memorandum dated February 29, 1996. This memorandum, which the Office incorporated into its April 1, 1996 decision rescinding acceptance of appellant's claim, explained that the Office may reevaluate whether factors are work related. The Office found that Board decisions have noted that denial of a training request is an administration function and does not fall within the performance of the claimant's duties. In the absence of employing establishment error, administrative and personnel matters are not compensable factors of employment. The Office found that the employing establishment provided sufficient reason for its decision and that there was no evidence of error.

The Office also found that workers' compensation law supported that the employing establishment's decision concerning appellant's oxygen request was in the administrative arena. The Office found that the employing establishment provided clear reasons for their decision. Concerning the shipment of radio equipment that appellant thought was incomplete, the Office found that appellant was in error. Concerning appellant's belief that his unit manager was improperly spending money on fancy executive furniture for his personal office, the Office found that frustration over not being able to work in a particular environment is not considered a compensable factor of employment because it is not in the performance of duty. The Office further found that decisions about work duties, training, relocation, changes of schedule, the assignment of housing, the transfer of personnel, the administration of travel regulations and the use of work time were administrative in nature and not compensable as there was no evidence of error. The Office noted that the employing establishment was not required to permit the use of sick leave to care for family members and that issues regarding sick leave were administrative in substance and not compensable as there was no evidence of error. The Office found that the denial of a within-grade increase and performance ratings were purely administrative and not compensable. The Office also found that denial of severance pay and a notice of proposed suspension were again personnel matters and not compensable as there was no evidence of employing establishment error. The Office found no evidence of error in the supervisor's action on June 11, 1985 in confronting appellant for being 10 minutes late, finding that it was the supervisor's duty to counsel and correct inappropriate actions by personnel. The Office also found no error in failing to respond to appellant's request for a padded chair in writing as the Office did respond in an active manner and provided the needed equipment change. Concerning appellant's collision with his supervisor and ensuing events, the Office found that appellant was "most in error" as his reaction contained violence and open hostility. The Office found that there was no evidence that the employing establishment or supervisor erred in any way.

As for appellant's exclusion from lists, the Office found that there was no evidence to support appellant's perception. As for being labeled a trouble maker, the Office found that this was hearsay and that there was no evidence to support this event. Concerning the use of his last name on his mailbox, the Office found that there was no evidence that the claimant brought this perceived problem to the notice of the employing establishment, so that they could make the claimant more comfortable. Since the employing establishment did not have an opportunity to assist appellant in changing the sign, the Office found no error. Further, the Office found that the placing of a sign in an establishment is an administrative function and there was no proven error. The Office also found that a settlement agreement on April 1, 1986 and the issues covered therein were not compensable, as there was no finding that the employing establishment erred in any of its actions.

With regard to appellant's grievances, the Office found that only one, concerning an adjustment of completion dates of work targets, granted relief; however, the grievance was settled and there was no finding of error or abuse on the part of the establishment. The Office noted that none of appellant's reprisal complaints resulted in a finding of discrimination. The Office finally noted that all appeals to the Merit Systems Protection Board were dismissed.

The Board finds that the Office properly rescinded its acceptance of appellant's claim.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim.² To satisfy its burden, the Office cannot merely second-guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.³

The Office has established through new legal arguments or rationale that its acceptance of appellant's claim was erroneous. Appellant attributed his emotional condition to retaliatory harassment by the employing establishment for his whistle-blowing activities. It is now well established that the actions of the employing establishment in administrative or personnel matters do not generally fall within coverage of the Federal Employees' Compensation Act. Where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters; however, coverage may be afforded.⁴ It is critical to appellant's claim, therefore, that the record contain evidence substantiating that supervisors or others in management were motivated by appellant's whistle-blowing activities and did in fact retaliate by harassing him. Further, the Board has held that actions of an employee's supervisor, which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. For harassment or discrimination to give rise to a compensable disability under the Act, however, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment or discrimination are not compensable under the Act.⁵ Again, it is critical that the record contain evidence substantiating that harassment or discrimination did in fact occur.

Appellant implicated a number of incidents that he believed constituted harassment and retaliation for his whistle-blowing activities. He also submitted voluminous material to support his claim. What he did not submit was evidence substantiating the retaliatory or harassing intent that he alleged or evidence showing that the actions taken by his supervisors or others in management were in fact erroneous or abusive. As the Office noted, appellant has been vigilant in pursuing his charges and seeking administrative and adjudicatory relief, but the record does not show that he has been successful in proving his charges. This is not to say that the employing establishment did not as a matter of fact retaliate against him or harass him. The

² *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

³ *Alfonso Walker*, 42 ECAB 129 (1990).

⁴ *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁵ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

issue is one of proof and a claimant bears the ultimate burden of proof to establish the essential elements of his claim. Without substantial evidence supporting his allegations of harassment or retaliation, error or abuse by the employing establishment in its actions following appellant's whistle-blowing activities, the record fails to establish that the employment factors to which appellant attributes his emotional condition fall within the scope of coverage of the Act.

The new legal argument or rationale put forth by the Office to rescind its acceptance of appellant's claim has merit and is supported by the record. Accordingly, the Board finds that the Office has met its burden to justify rescission.

The November 12, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 19, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member