U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JAMES E. NORRIS and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Los Angeles, CA

*Docket No. 98-2293; Oral Argument Held July 21, 1999;*
*Issued October 5, 2000*

Appearances: James E. Norris, *pro se,* Sheldon G. Turley, Jr., Esq.,
for the Director, Office of Workers' Compensation Programs.

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## DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition arising in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied his request for reconsideration.

On October 28, 1992 appellant, then a 42-year-old aviation safety inspector, filed a claim alleging an emotional condition, which he attributed to his federal employment. He alleged emotional distress and depression caused by harassment and discrimination during training at the employing establishment flight academy and proficiency flying between July 8 and October 24, 1991.[1] Appellant was removed from his position as a safety inspector on November 2, 1992 for failure to maintain his flight status.[2]

Appellant submitted a statement pertaining to his allegations. On November 2, 1990 he graduated from the employing establishment's general aviation indoctrination course on single and multiengine aircraft. Appellant noted completing 27.4 hours flight time and 19.3 hours of simulator time. He was subsequently assigned to the Los Angeles District Office. Appellant alleged that on June 20, 1991 he was required to attend a jet evaluation flight course due to the resignation of an inspector from Los Angeles, without receiving any prior aircraft jet training or proficiency time. Appellant related that, when he reported to the fight academy in Oklahoma City from July 8 to 18, 1991, he experienced harassment and discrimination. Appellant indicated

[1] The record indicates appellant became a flight inspector with the employing establishment in 1988.

[2] Appellant's pilot certificate was suspended in November 1991. Thereafter, he was reassigned to administrative duties until his termination.

that, on May 30, 1991, his name had appeared in a *U.S.A. Today* newspaper article on race discrimination in the commercial airline industry as a putative class member in litigation brought against United Airlines. He alleged that, in response to the newspaper article, jet instructor Larry Eversmeyer harassed him. Appellant alleged that he was falsely graded by Mr. Eversmeyer and pretextually failed in the jet-training course.[3] He maintained that his performance was proficient and he had really passed the course.

Appellant returned to Los Angles where, on September 9, 10 and 17, 1991, he underwent flight proficiency evaluations in a single engine Cessna. He alleged that he was harassed by inspector Meyer during these flights. Appellant returned to the flight academy in Oklahoma City on September 30, 1991 for a light aircraft refresher course. He noted that his supervisor, Richard Swanson, denied his September 13, 1991 request not to be sent back to the academy and alleged that a conspiracy had formed to fail him at the academy. Appellant alleged that out of a total of 24.1 hours of flight time prior to his return to the academy, 21.5 hours had been flown while he was being harassed or discriminated against. He alleged he had been advised that the light twin engine refresher course would provide 10.9 hours of proficiency flight time and not be a pass/fail course. Appellant was assigned to fly with the employing establishment contract pilot Ed Frye, whom he alleged harassed and intimidated him until October 4, 1991, the final day of class. He also flew with inspector Marv Radloff, whom he indicated treated him with respect and fair behavior. Appellant indicated that Mr. Radloff stated that appellant had lost confidence in his flying since his the employing establishment academy graduation on November 2, 1990. He contended that his successful completion of the employing establishment academy course in 1990 established that academy personnel fabricated his failure of the light twin refresher course in 1991 due to a conspiracy.

Upon his arrival back to Los Angeles on October 7, 1991, Mr. Swanson advised appellant that he would be required to fly a formal evaluation flight in a multi-engine aircraft. The evaluation flight was scheduled for October 24, 1991. Appellant visited the employing establishment flight surgeon, Dr. Stephen H. Goodman, on October 22, 1991. On October 24, 1991 appellant underwent the evaluation flight with inspector Bob Christopher, with whom he had previously flown 2.6 hours.[4] He was failed on the evaluation flight and on October 29, 1991 was advised that he would be required to undergo reexamination of his qualification to hold his the employing establishment pilot certificate.[5] Appellant alleged disparate treatment and discrimination in the suspension of his the employing establishment certificate. He contended that he had demonstrated solid performance while at the the employing establishment academy and was proficient in his evaluation flights. Appellant also noted that his work performance had been satisfactory in Los Angles while under supervision of the employing establishment Manager Bonnie C. Pankalla and that he experienced discrimination and harassment following her transfer on March 12, 1991 to the Great Lakes Region.

[3] Upon his return to Los Angeles, appellant filed an Equal Employment Opportunity complaint related to his academy experience.

[4] Appellant noted he was never harassed or discriminated against by Inspector Christopher.

[5] Under Federal Aviation Authority requirements, an aviation safety inspector must hold a valid pilot certificate.

On November 5, 1991 appellant underwent treatment by Dr. Lon Engelberg, a psychiatrist. In a December 15, 1991 note to the employing establishment, Dr. Engelberg diagnosed major depression and advised that appellant evidenced an impaired ability to concentrate to the extent that he was disabled from piloting aircraft. Appellant was prescribed anti-depressant medication. Dr. Engelberg referred appellant to Dr. Alex B. Caldwell, a clinical psychologist, for diagnostic testing. In a February 23, 1992 report, Dr. Caldwell addressed appellant's psychological profile, stating:

> "The profile indicates the use of multiple paranoid defenses with a vulnerability to a psychotic decompensation if not a current breakdown of reality testing. It should be noted that a few patients have obtained related profiles in reconstituted phases following acutely psychotic episodes. When threatened, he would project and could seriously misinterpret the motives of others; however, he would rationalize his own behavior and defend against facing his hostility through denial and such reaction formations as, 'It is not my anger; I want to be kind and at peace.' He tests as prone to cover over and deny the intensity of his resentments and to justify extensively any past acts that were even indirectly revengeful. He appears relatively rigid and inflexible emotionally…."

Dr. Caldwell noted that in 1985 appellant participated in a class action lawsuit against United Airlines when his application to be a pilot was turned down. Appellant reported having no problems working at the the employing establishment, where he continued to work, until his name appeared in a newspaper article about the lawsuit in May 1991. Dr. Caldwell noted that, during July and September of 1991, appellant was failed by two flight instructors in flight training courses and that appellant felt these individuals were out to get him because of the lawsuit.

On December 8, 1992 appellant submitted documents relating to his disability retirement from the employing establishment. In an October 23, 1992 report to the employing establishment, Dr. Engelberg noted his treatment of appellant for the diagnosis of a delusional disorder, persecutory type. He noted that appellant had improved significantly regarding his depression; however, he continued to be "self-referential about his supervisor's activities to the point of vague paranoid ideation."[6]

Documents were submitted pertaining to the employing establishment's denial of appellant's grievance based on his allegations of discrimination. In an April 22, 1992 decision, Administrative Law Judge Jerrell R. Davis found, following an evidentiary hearing, that employing establishment personnel had not discriminated against appellant in connection with any flight courses, tests or flight checks, and that a reasonable basis existed for requiring appellant to submit to a reexamination of his flight proficiency in October 1991. In an

[6] On May 14, 1994 a hearing was held on appellant's disability application before an Administrative Law Judge for the Social Security Administration (SSA). Appellant was found to be under emotional distress and depression while employed at the employing establishment and entitled to disability benefits under that statute effective November 2, 1992.

October 7, 1992 decision, the National Transportation Safety Board upheld Judge Davis' decision.

By decision dated March 2, 1993, the Office denied appellant's claim finding that the evidence did not establish that appellant's emotional condition was sustained while in the performance of duty.

On March 15, 1993 appellant requested a hearing before an Office hearing representative that was held on January 12, 1994. Following the hearing, appellant submitted a December 14, 1993 statement from Walter Wise who worked with appellant in Los Angeles from September 1988 to May 1989. Mr. Wise opined that a supervisor, Robert Bebout, appeared to be out to get appellant fired. He indicated that appellant was made "the butt of a lot of jokes" and that "a lot of discriminatory remarks were made." Mr. Wise opined that appellant had performed well but was not allowed to obtain sufficient proficiency flight time. Mr. Wise noted that he did not fly any proficiency flights during his nine months at Los Angeles.

By decision dated March 23, 1994, the Office hearing representative affirmed the March 2, 1993 decision.

On October 12, 1994 appellant requested reconsideration before the Office, contending that, as the SSA had found him disabled due to severe emotional distress and depression while employed with the employing establishment, he had established entitlement to compensation benefits. Appellant also submitted statements from several coworkers, Henry H. Polchow dated September 2, 1992; James Gibson dated February 20, 1992; and James D. Kelly dated February 8, 1994. Appellant resubmitted a copy of the statement from Mr. Wise.

Mr. Polchow stated that he overheard Mr. Bebout make a "threatening statement" to Mr. Gibson about appellant's performance in early 1988. Mr. Polchow indicated that the following morning he learned that Mr. Gibson had passed appellant on a check ride.

Mr. Gibson stated that he was hired as an aviation inspector in July 1988 and employed until January 1989 when he was terminated. He alleged that several inspectors in charge of his training, Jerry Parrott and Clair Merton, made "racial remarks and derogatory comments" against appellant. He noted that Ms. Pankalla authorized flight simulation training and that Mr. Bebout became upset when Mr. Gibson advised him that appellant was rusty and could use some refresher training as a pilot. Mr. Gibson noted that Ms. Pankalla terminated him on January 3, 1989. Mr. Gibson attributed his termination to retaliation by Mr. Bebout.

Mr. Kelly noted that he was employed by the employing establishment since June 1976 and was a union representative who became involved with appellant, providing advice pertaining to the agency orders and testimony at the National Transportation Safety Board hearing. He noted that he never worked with appellant and was an "outsider to the process." However, Mr. Kelly stated that he had read and talked about what happened during appellant's flight career. He opined that appellant was treated harsher than others in flight standards, but could not say whether this was due to discrimination.

By decision dated January 30, 1995, the Office denied modification of its prior decisions. The Office noted that it was not bound by findings of disability for claims arising under the SSA. The Office determined that the statements submitted by appellant were not sufficient to establish error or abuse in the employing establishment's 1992 removal action.

Appellant filed an appeal with the Board, which was docketed as No. 95-1982. By order dated July 7, 1995, the Board dismissed the appeal in response to appellant's request that his appeal be withdrawn in order that he could submit additional evidence to the Office.[7]

By decision dated June 17, 1997, the Office denied reconsideration of its prior decisions. The Office reviewed appellant's argument pertaining to the May 19, 1994 decision of the SSA relating to the acceptance of disability due to his emotional condition while employed with the employing establishment. It also reviewed an April 30, 1995 report from Dr. Robert Grumer, an osteopath specializing in psychiatry, who provided mental health care to appellant since February 1993 for major depression. Dr. Grumer noted appellant's belief that his depression was caused by discrimination at his work at the employing establishment. Dr. Grumer recommended that the Office access the records of Dr. Engelberg. The Office noted that the hearing representative had the benefit of reviewing Dr. Engelberg's medical reports. The Office also considered appellant's argument that he did not receive a fair or equitable hearing before the Office, based on his contention that the medical evidence established that his emotional condition was employment related.

By letter dated June 24, 1997, appellant again requested reconsideration of his claim, contending that he had submitted sufficient evidence to establish his claim. Appellant submitted the October 3, 1996 statement of Ms. Pankalla, the former manager of the Los Angeles District Office of the employing establishment. Ms. Pankalla noted that she became manager at Los Angeles on June 5, 1988, several months after appellant was hired as an inspector. She discussed appellant's proficiency training during 1988 and 1989 and noted he had been a highly productive worker. She noted that appellant was provided flight time to practice flight maneuvers, take-offs and landings to be currently proficient. Appellant attended the employing establishment academy from July 20 until August 10, 1989, when he was involved in an automobile accident. Appellant stayed at the academy and completed the classroom portion of training. He again attended the academy in November 1990 and successfully completed the flight portion of his indoctrination training. Ms. Pankalla noted that the academy manager had commended appellant for his motivation in completing his indoctrination training.

By decision dated March 12, 1998, the Office denied modification of its prior decisions. The Office found that the fact that appellant successfully completed his indoctrination work for the employing establishment did not establish that he would be successful in the additional training classes in 1991. Further, the evidence was found insufficient to establish discrimination or harassment in the administrative actions taken against appellant in 1991 and 1992.

[7] The record indicates that appellant filed a suit under the Federal Tort Claims Act following the dismissal of his appeal. Appellant settled this matter with the Office agreeing to review any new material submitted.

On April 14, 1998 appellant again requested reconsideration of his claim. Appellant reiterated his argument that he had successfully completed the employing establishment training and had the highest skill level license the employing establishment issued. He contended that, after Ms. Pankalla was promoted and transferred on March 12, 1991, various employing establishment supervisors, managers and coworkers conspired to label him as a substandard pilot. Appellant reiterated his arguments that he was unjustly removed from his position with the employing establishment and had submitted evidence sufficient to establish his emotional condition was due to harassment and discrimination by his supervisors and managers.

By decision dated May 22, 1998, the Office denied appellant's request for reconsideration.

The Board finds that appellant has not established that his emotional condition arose out of the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[8] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[9] When an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[10] The Board in *Cutler*, then noted that other cases established that a disabling condition resulting from an employee's feelings of job insecurity were not sufficient to constitute a personal injury sustained while in the performance of duty. Similarly, if the employee is unhappy doing inside work, desires a different job, broods over the failure to be given the kind of work he desires or secure a promotion, such is not sufficient to constitute a personal injury sustained in the performance of duty.[11]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[12] This includes matters

[8] 28 ECAB 125 (1976).

[9] *See Anthony A. Zarcone*, 44 ECAB 751, 754-5 (1993).

[10] *Lillian Cutler, supra* note 8 at 130.

[11] *Id.* at 131.

[12] *See Gregory N. Waite*, 46 ECAB 662 (1995); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

involving the training or discipline of employees. However, the Board has held where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[13] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of the case to determine whether the employing establishment acted reasonably.[14]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[15] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that work place harassment or unfair treatment occurred.[16] Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under Equal Employment Opportunity Commission standards. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[17]

In the present case, appellant has not attributed his emotional condition to the performance of his regular duties as an aviation inspector or to any special work requirement arising from his employment duties under *Cutler*. Nor has appellant implicated his workload as an aviation inspector as having caused or contributed to his emotional condition. Throughout the case record, appellant has maintained that his job performance was satisfactory and proficient.

Appellant's claim pertains to allegations of harassment and discrimination by his supervisors and flight inspectors at the employing establishment Los Angeles office and at the Oklahoma flight academy following the publication of his name in a newspaper article on May 30, 1991. Appellant has attributed his failure in the flight training courses at the employing establishment academy in 1991, the reexamination of his flight certificate and his removal from the employing establishment in 1992 to acts of discrimination and a conspiracy against him. This history was reiterated by Dr. Caldwell, who noted that appellant reported having no problems working at the employing establishment, until his name appeared in the May 1991 newspaper article and he subsequently failed several flight training courses. The Board finds, however, that appellant has not submitted sufficient evidence to establish his allegations of discrimination or retaliation by employing establishment personnel in response to the 1991 newspaper article. Appellant failed to provide a statement describing how flight inspectors

[13] *See Jose L. Gonzalez-Garced*, 46 ECAB 237 (1994); *Norman A. Harris*, 42 ECAB 923 (1991).

[14] *Ruth S. Johnson*, 46 ECAB 237 (1994); *David W. Shirey*, 42 ECAB 783 (1991).

[15] *See Michael Ewanichak*, 48 ECAB 354 (1997); *Martha L. Cook*, 47 ECAB 226 (1995).

[16] *See Parley A. Clement*, 48 ECAB 302 (1997).

[17] *See Michael Ewanichak, supra* note 15.

Eversmeyer or Meyer harassed or discriminated against him during the training courses and proficiency evaluations. His description of interactions with his supervisors and flight inspectors are vague, general in nature and provide no detail for his stated conclusion that the employing establishment personnel "fabricated" his failure in the training classes or proficiency evaluations. The record establishes that appellant's allegations were also presented before an Administrative Law Judge who, after an evidentiary hearing, found that employing establishment had not discriminated against appellant in connection with any flight courses, tests or flight checks.

The statements submitted by appellant's former supervisor and coworkers are of limited relevance to establishing his claim. Mr. Wise and Mr. Gibson noted working with appellant in 1988 and 1989, prior to the period of discrimination alleged commencing in May 1991 with the publication of the appellant's name in a newspaper article. The statements provided comment generally on appellant being made the butt of jokes and of discriminatory remarks being made, but provided few specifics pertaining to the individuals involved, time, place or occurrence of alleged remarks or jokes. The Board notes that several statements were from former coworkers also terminated by the employing establishment. Ms. Pankalla described appellant's indoctrination course work and proficiency training during 1988 and 1989, noting her departure from the Los Angeles office in March 1991. She did not provide any statement as to alleged comments or incidents of discrimination in 1988 or 1989 during her tenure as manager. Mr. Kelly noted he was an "outsider to the process" and could not say whether appellant's treatment in 1991 was due to discrimination. The Board finds that this evidence is insufficient to establish appellant's allegations of a "conspiracy" against him pertaining to his flight training, evaluations and courses in 1991. Moreover, the reports of Dr. Engelberg addressed treatment of appellant for a "delusional disorder, persecutory type," noting that appellant was "self-referential about his supervisor's activities to the point of vague paranoid ideation." Dr. Caldwell found that appellant's psychological profile revealed "the use of multiple paranoid defenses with a vulnerability to a psychotic decompensation if not a current breakdown of reality testing." The Board finds that appellant has not established as factual a basis for his perceptions of discrimination or harassment by the employing establishment personnel after May 1991. The fact that he demonstrated proficiency during indoctrination training and flight courses in 1988 and 1989 does not establish that appellant would be successful in subsequent aircraft training or evaluation flights in 1991.

Appellant submitted a copy of a decision of the SSA that awarded him benefits for his emotional disability. In this regard, appellant contends that because he was awarded benefits for disability retirement purposes he is disabled for compensation purposes under the Act. In *Hazelee K. Anderson*,[18] the Board noted that entitlement to benefits under one act does not establish entitlement to benefits under the other.[19] The findings of other administrative agencies have no bearing on proceedings under the Act, which is administered by the Office and the Board. A determination made for disability retirement purposes is not determinative of the extent of physical disability or impairment for compensation purposes. The two relevant statutes (Social Security Act and the Federal Employees' Compensation Act) have different standards of

[18] 37 ECAB 277 (1986).

[19] *Id*. at 282-83.

medical proof and the question of disability found under one statute does not prove disability under the other.[20] Under the Federal Employees' Compensation Act, for a disability determination, appellant's injury must be shown to have arisen during the course of his employment due to compensable factors of his federal employment. Under the SSA, conditions which are not work related may be considered in determining disability. For this reason, the decision of the SSA finding appellant disabled under that Act is not binding upon the Office in the adjudication of appellant's claim under the Federal Employees' Compensation Act.

The Board also finds that the Office properly denied appellant's request for reconsideration.

Following the March 12, 1998 merit decision denying modification of its prior decisions, appellant submitted an April 14, 1998 request for reconsideration. Appellant reiterated his contention that his successful completion of the employing establishment indoctrination training established his flight proficiency and skill and that, following Ms. Pankalla's transfer on March 12, 1991, various employing establishment personnel had conspired to label him a substandard pilot. Appellant repeated his contention that he was unjustly removed from his position with the employing establishment and that he had submitted sufficient evidence to establish his claim for compensation.

Under the Office's federal regulations, a claimant may obtain review of the merits of his claim by written request and identifying the decision and specific issues within the decision the claimant wishes the Office to reconsider.[21] The claimant must: (i) show that the Office erroneously applied or interpreted a point of law; (ii) advance a point of law or fact not previously considered by the Office; or (iii) submit relevant and pertinent evidence not previously considered by the Office.[22] The regulations provide that any application for review of the merits which does not meet at least one of the requirements listed will be denied without review of the merits of the claim.[23] In evaluating whether the Office has abused its discretion in denying an application for review, the Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a claim for merit review.[24]

In support of his request for reconsideration, appellant did not submit any new evidence or advance a point of law or fact not previously considered by the Office. Appellant's contentions pertaining to his flight proficiency and allegations of discrimination following the departure of Ms. Pankalla in March 1991 had been previously reviewed and evaluated by the Office. The Office had previously evaluated the evidence pertaining to appellant's removal from his position with the employing establishment and arguments pertaining to the receipt of benefits

[20] *See also Daniel Deparini*, 44 ECAB 657 (1993); *John P. Hurley*, 34 ECAB 494 (1982).

[21] 20 C.F.R. § 10.138(b)(1).

[22] *Id.*

[23] 20 C.F.R. § 10.138(b)(2).

[24] *Richard L. Ballard*, 44 ECAB 146 (1992); *Nora Favors*, 43 ECAB 403 (1992).

under the SSA. As appellant failed to submit any new argument or evidence to establish that he was disabled due to compensable factors of his federal employment, the Office properly denied further merit review of his claim.

The May 22 and March 12, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 5, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member