

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONALD L. MILBURN and DEPARTMENT OF LABOR,  
MINE SAFETY & HEALTH ADMINISTRATION, Vincennes, IN

*Docket No. 00-1597; Submitted on the Record;  
Issued April 11, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

The Board finds that the case is not in posture for 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 Federal Employees' Compensation Act.<sup>1</sup> 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.<sup>2</sup>

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 employment factors.<sup>3</sup> This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>4</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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 of Workers' Compensation Programs 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.<sup>5</sup> 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.<sup>6</sup>

In March 1999 appellant, then a 48-year-old coal mine inspector, alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated August 23, 1999, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. After a review of the written record, an Office hearing representative issued a decision, dated February 14, 2000 and finalized February 16, 2000, which affirmed the Office's August 23, 1999 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that, during a meeting on September 4, 1998, Donald Persinger, a supervisor, committed harassment and discrimination by making abusive statements and treating the meeting like an interrogation. He also alleged that, during a meeting at the workplace on March 19, 1999, Mr. Persinger committed harassment and discrimination by making abusive statements and preventing his wife from attending the meeting. Appellant also generally claimed that Mr. Persinger retaliated against him for filing grievances and harassed him by adopting a hostile attitude and verbally abusing him.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>7</sup> 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.<sup>8</sup> 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 supervisor.<sup>9</sup> Appellant alleged that his supervisor made statements and engaged in actions

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<sup>5</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>6</sup> *Id.*

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

<sup>8</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>9</sup> 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).

which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.<sup>10</sup> Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that in 1998, the employing establishment improperly reassigned his work vehicle to a coworker and wrongly assigned him another vehicle which was unsafe. He claimed that he was wrongly denied the right to have a representative present during the September 4, 1998 meeting and that his representative was not informed regarding a proposed suspension issued on December 3, 1998. Appellant alleged that he received unfair performance evaluations and that he was subjected to improper disciplinary actions, including the suspension action which was initiated in December 1998. He claimed that his identification card and keys were wrongly taken from him in connection with this suspension and that after he returned from the suspension he was improperly assigned to a new supervisor and given different duties.<sup>11</sup> Appellant also alleged that Mr. Persinger acted improperly on March 19, 1999 when he made an unannounced visit to his house in order to deliver a disciplinary action.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, improperly assigned work duties and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>12</sup> Although the handling of disciplinary actions and evaluations, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.<sup>13</sup> However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>14</sup>

The record contains August 1999 statements, in which the Secretary of Labor and the Assistant Secretary for Mine Safety and Health indicated that Mr. Persinger acted improperly when he made an unannounced visit to appellant's home on March 19, 1999. The Assistant Secretary for Mine Safety and Health noted that the finding of improper conduct was made after an investigation was conducted. Therefore, appellant has shown that Mr. Persinger committed

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<sup>10</sup> See *William P. George*, 43 ECAB 1159, 1167 (1992).

<sup>11</sup> Appellant also alleged that he sustained stress on January 12, 1999 when his vehicle slid off the road while he was on his way to work. Appellant did not adequately establish the factual basis for this incident or sufficiently explain how it related to his regular or specially assigned duties.

<sup>12</sup> See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

<sup>13</sup> *Id.*

<sup>14</sup> See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

error with respect to the March 19, 1999 visit to his home and he has identified a compensable employment factor in this regard.

As noted above, appellant alleged that other administrative and personnel matters constituted employment factors. However, appellant has not submitted sufficient evidence to establish that the employing establishment committed error or abuse with regard to these matters. Appellant filed numerous grievances in connection with a number of these claimed incidents and conditions, but the record does not contain any decisions finding that error or abuse was committed. Thus, appellant has not established a compensable employment factor under the Act with respect to these other administrative and personnel matters.

In the present case, appellant has identified a compensable employment factor with respect to the March 19, 1999 visit of Mr. Persinger to his home. As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.<sup>15</sup> After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

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<sup>15</sup> See *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

The decisions of the Office of Workers' Compensation Programs dated February 14, 2000 and finalized February 16, 2000 and dated August 23, 1999 are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
April 11, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member