

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WELLINGTON H. MITCHELL and DEPARTMENT OF COMMERCE,  
NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Silver Spring, MD

*Docket No. 00-1380; Submitted on the Record;  
Issued December 28, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant's emotional condition was causally related to compensable factors of employment.

The case has been on appeal twice previously.<sup>1</sup> In a July 1, 1996 decision, the Board noted that appellant had cited many incidents, which he claimed showed that he was subjected to harassment and discrimination at the employing establishment. The Board found that the Office of Workers' Compensation Programs had not developed the record fully to determine whether appellant had been subjected to harassment or discrimination at work. The Board pointed out that appellant had submitted a decision by a U.S. District Court, which found appellant had been subjected to racial discrimination in the denial of a promotion. The employing establishment was ordered to promote appellant retroactively and pay back pay. The Board stated that this decision constituted evidence of error and abuse by the employing establishment. The Board further noted that an Office hearing representative had instructed the Office to obtain signed statements from supervisors and coworkers who were cited in appellant's complaints of harassment. The Office did not carry out the instructions on the grounds that the incidents cited were unsubstantiated and were not part of appellant's assigned duties and, therefore, did not constitute compensable factors of employment. The Board, however, found that the cited incidents would be considered compensable factors of employment if error or abuse by the employing establishment were shown to have occurred. The Board indicated that the employing establishment had only addressed one incident described by appellant. The case was remanded for further development of the evidence relating to the other incidents cited by appellant.

In a May 19, 1999 decision, the Board found that the Office, in denying appellant's claim, had only considered the statements it had solicited from witnesses and had failed to consider the decision of the U.S. District Court, which was evidence of error or abuse on the part of the employing establishment. The Board also noted that the Office had found that appellant's

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<sup>1</sup> Docket No. 97-1380 (issued May 19, 1999); Docket No. 94-1624 (issued July 1, 1996).

allegations could not be proven or disproven and, therefore, he was unable to establish that compensable factors existed in his case. The Board pointed out that, in the absence of a response or comment from the employing establishment, an Office claims examiner had the discretion to accept appellant's claim as factual. The Board indicated that the Office had exercised discretion on one incident, in which appellant was found to be verbally abusive to coworkers. It found, however, that the Office had not exercised its discretion in regard to appellant's claims of harassment and discrimination in such actions as verbal abuse from supervisors, denial of training and equipment to do his job, poor performance evaluations and placement on performance improvement plans. The Board, therefore, remanded the case for consideration of the decision of the U.S. District Court in finding whether appellant was subjected to discrimination in promotion. The Office was also instructed to exercise its discretion in determining whether to accept appellant's statements, in whole or in part, as factual.

On remand, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Gerald P. Perman, a Board-certified psychiatrist, for an examination and second opinion on whether appellant's emotional condition was related to the compensable factors of his employment. In the statement of accepted facts, the Office accepted that the decision that appellant was subjected to discrimination in promotion was a compensable factor of employment. The Office stated that the incidents regarding requests for additional documentation for sick leave, the receipt of memoranda on use of sick leave, work performance and denial of training and the issuance of a performance improvement plan, were not compensable factors of employment. The Office found that appellant's claims of verbal abuse, harassment, discrimination and denial of material or information to perform his job, did not occur.

In a November 5, 1999 report, Dr. Perman diagnosed major depression and post-traumatic stress disorder, both in partial remission. He noted that appellant's treating physician, Dr. Gustave J. Weiland, a Board-certified psychiatrist, had attributed appellant's major depressive disorder to the continual harassment he received at work. Dr. Perman stated that it was unlikely that the failure to receive a promotion, by itself, could produce a major depressive disorder. He commented that appellant's lack of promotion did not stand out in his interview of appellant as the precipitating or causal factor for the development of the depression. Dr. Perman stated that the discrimination that appellant experienced by not receiving a promotion, while unfair and unacceptable, did not meet the requirement for the definition of an event that could have precipitated post-traumatic stress disorder. He, therefore, concluded that appellant's failure to receive the promotion did not cause his emotional condition and, therefore, appellant did not sustain an employment-related injury. Dr. Perman stated that appellant continued to experience symptoms of a major depressive disorder, including sleep disturbance, depressed mood, lack of interest in previously pleasurable activities, fatigue and loss of energy. He concluded that these conditions were caused by the harassment appellant described as occurring at work, even though the Office did not acknowledge the harassment in the statement of accepted facts. Dr. Perman noted that some of the symptoms might be related to the stroke appellant had in 1995. He stated that since the statement of accepted facts only accepted the lack of promotion as having occurred and the Office did not acknowledge that the harassment had occurred, appellant did not have a work-related condition.

In a November 5, 1999 decision, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish that the claimed condition was causally related to accepted activities or employment factors.

The Board finds appellant has not established that his emotional condition was causally related to accepted factors of his employment.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. 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. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.<sup>2</sup> When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.<sup>3</sup> In these cases the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.<sup>4</sup>

In this case, the Office, in accordance with the prior decisions of the Board, found that the verbal abuse, harassment and discrimination alleged by appellant did not occur as there was no evidence to establish that the incidents had occurred. The Office properly determined that the additional requirement of documentation of sick leave, appellant's marginal performance evaluation and resulting performance improvement plan, his suspension for five days and the receipt of memoranda regarding his sick leave, performance and denial of training, were not compensable factors of employment. All these matters relate to administrative actions of the employing establishment. These factors cannot be considered compensable factors of employment unless appellant could show that the actions taken were in error or abusive. While appellant has claimed that the employing establishment's actions were abusive as part of a pattern of harassment, he has not submitted sufficient evidence to establish that the actions of the employing establishment constituted harassment.

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<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

<sup>4</sup> *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

The only compensable factor of employment found to have occurred in appellant's case was the finding that he was subjected to discrimination in the denial of a promotion. Dr. Perman stated that the denial of the promotion, by itself, was not sufficient to cause or precipitate appellant's depressive disorder or post-traumatic stress disorder. He related appellant's condition to harassment but pointed out that the Office had not accepted harassment as having occurred. Dr. Perman, therefore, concluded that appellant's emotional condition was not related to the compensable factors of his employment. The reports and deposition of Dr. Weiland are insufficient to overcome the probative value of the well-reasoned report of Dr. Perman. As Dr. Perman pointed out, Dr. Weiland related appellant's emotional condition to harassment at work. However, the Office did not accept that appellant was subjected to harassment. Dr. Weiland's reports, therefore, fail to relate appellant's emotional condition to an accepted compensable factor of employment. The weight of the medical evidence, therefore, establishes that appellant's emotional condition was not causally related to the compensable factors of his employment.

The decision of the Office of Workers' Compensation Programs, dated November 5, 1999, is hereby affirmed.

Dated, Washington, DC  
December 28, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member