

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL P. EMERSON and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, BORDER PATROL, Chula Vista, CA

*Docket No. 01-662; Submitted on the Record;
Issued December 27, 2001*

DECISION and ORDER

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

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his employment.

On September 20, 1999 appellant, then a 48-year-old Equal Employment Opportunity (EEO) manager, filed a claim for an emotional condition caused by a heavy workload, working at home without receiving overtime pay and having his supervisor change his request for administrative leave to sick leave. He became embarrassed when he inadvertently left a personal envelope on another employee's desk and this employee opened the envelope and saw items of a personal nature. He noted having the employing establishment denied his request to have another employee drive him to a training session, he was asked by his supervisor about his means of transportation to work after his driver's license was suspended and his supervisor contacted his physician to verify the authenticity of a return-to-duty form. Appellant alleged some of his duties were reassigned to other employees in 1999, not being consulted for his opinion regarding agency or complainant resolution, not being included in meetings at another agency and being harassed by Rosalind Reshad when appellant was selected for his current position.¹

In a memorandum dated March 25, 1999, Harold R. Beasley, Sr., Deputy Chief Patrol Agent and appellant's supervisor, stated that on the previous day he met with appellant and an assistant chief patrol agent concerning appellant's job performance and the perception from several employees that appellant might be under the influence of alcohol or prescription drugs. Appellant was tearful and stated that he was taking various medications and seeing a number of physicians. Mr. Beasley noted that on March 25, 1999 appellant unintentionally left a personal envelope containing nude photographs on another employee's desk and this employee opened

¹ Appellant alleged that Ms. Reshad "constantly berated" him and was condescending, tried to circumvent his immediate supervisor by giving him assignments and tried to undermine his efforts.

the envelope and then gave it to a supervisor. He indicated that appellant had been a good employee and his recent behavior was not in character for him.

In a note dated September 9, 1999, Dr. Eduardo Val, appellant's attending psychiatrist, diagnosed chronic panic disorder with post-traumatic stress features and a possible bipolar disorder and indicated that appellant was disabled.

In a letter dated September 23, 1999, Dr. A.B. Niculescu, a psychiatrist, stated that appellant was hospitalized from September 26 to 29, 1999 for bipolar affective disorder, an anxiety disorder and alcohol dependence.

In letters dated October 28 and November 16, 1999, Mr. Beasley stated that the employing establishment did not agree with appellant's allegations. He stated that appellant was an EEO manager for the San Diego Sector with duties consisting of tracking and monitoring EEO complaints, assisting and preparing documents for EEO investigators, providing technical guidance to Sector management, coordinating activities of the Sector EEO committee, coordinating and providing mandatory EEO training to Sector employees and various other advisory duties. He stated that appellant was assisted by a secretary, approximately 15 trained EEO counselors and 10 Special Emphasis Programs Managers. Mr. Beasley stated that appellant was never required to perform any duties at home, including taking work home or answering telephone inquiries or pages after work hours and had even been advised that taking work home and taking calls after work hours was not authorized by the employing establishment. He stated that appellant was never assigned intense projects or subjected to unrealistic deadlines and there were no staffing shortages. Mr. Beasley noted that the workload increased between 1995 and 1999 but appellant had maintained an efficient EEO department and never informed management that there was any problem of undue stress, workload or nonsupport from Sector management. He indicated that appellant had no job performance problems until March 1999.

Appellant submitted a copy of a November 9, 1999 letter from the Office of Personnel Management indicating that his application for disability retirement had been approved.²

By decision dated December 22, 1999, the Office denied appellant's claim for an emotional condition on the grounds that he had failed to establish any compensable factors of employment.

Appellant requested an oral hearing that was held on September 12, 2000.

By decision dated December 7, 2000 and finalized on December 15, 2000, the Office hearing representative affirmed the Office's December 22, 1999 decision.

The Board finds that appellant has failed to establish that his emotional condition was causally related to factors of his employment.

² The Board notes that approval of a disability claim by another federal agency under its rules and regulations is not determinative of a claimant's entitlement to compensation under the Federal Employees' Compensation Act. See *Daniel Deparini*, 44 ECAB 657, 659-60 (1993).

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 Act.³ 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.⁴

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.⁵ 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.⁶

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, 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.⁷ 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.⁸

In this case, appellant alleged that he sustained an emotional condition due to a number of employment incidents and conditions. The Board must review whether these alleged incidents and conditions of employment are covered employment factors under the Act.

Regarding appellant's allegations that the employing establishment changed his request for administrative leave to sick leave, denied his request to have an employee drive him to a training session, asked him how he got to work after his driver's license was suspended, contacted his physician to verify the authenticity of a report, and assigned some of his duties to other employees, the Board finds that these allegations relate to administrative or personnel

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ See *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ See *Effie O. Morris*, 44 ECAB 470, 473 (1993).

⁷ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

⁸ *Id.*

matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.⁹ Although these matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹⁰ 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 letters dated October 28 and November 16, 1999, Mr. Beasley denied appellant's allegations and appellant has provided insufficient evidence of error or abuse by the employing establishment in its handling of these administrative matters. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that he was harassed by a coworker, Ms. Reshad, when he was selected for a position. He alleged that Ms. Reshad "constantly berated" him and was condescending, tried to circumvent his supervisor by giving him assignments and tried to undermine his efforts. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹¹ 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.¹² In this case, appellant has not submitted sufficient details regarding the allegation of harassment by Ms. Reshad for a determination to be made as to whether the allegation is factual.¹³ Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's claim that a heavy workload contributed to his emotional condition, the Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensable.¹⁴ In this case, Mr. Beasley stated that appellant was assisted by a secretary, approximately 15 trained EEO counselors and 10 Special Emphasis Programs Managers. He stated that appellant was not authorized to perform any of his duties at home, that appellant was never assigned intense projects or subjected to unrealistic deadlines and there were no staffing shortages. Mr. Beasley noted that the workload increased between 1995 and 1999 but appellant had maintained an efficient EEO department and never informed management that there was any problem of undue stress, workload or nonsupport from management. Appellant has provided insufficient evidence that he had a workload that he could not handle. Therefore, appellant has not established a compensable factor under the Act in this respect.

⁹ See *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁰ *Id.*

¹¹ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹² See *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹³ 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).

¹⁴ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

Appellant also alleged that he worked at home without pay. In letters dated October 28 and November 16, 1999, Mr. Beasley stated that appellant was never required to perform any of his duties at home and had even been advised that taking work home and taking calls after work hours was not authorized by the employing establishment. Thus appellant has not established a compensable factor of employment in this respect.

Appellant also alleged that he was embarrassed on March 25, 1999 when he left an envelope on another employee's desk and this employee opened the envelope and saw items of a personal nature. This incident bears insufficient relationship to appellant's work duties and is not deemed a compensable factor of employment.

Regarding appellant's allegations that he was not consulted for his opinion regarding agency or complainant resolution, and not included in meetings at another agency, he has submitted insufficient detail for determination of whether these allegations are factual. Therefore, appellant has not established a compensable factor of employment in this respect.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁵

The December 15, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 27, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹⁵ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki, supra* note 7.