

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH MICHAEL WAGNER and DEFENSE LOGISTICS AGENCY,
DEFENSE DISTRIBUTION CENTER, New Cumberland, PA

*Docket No. 00-1491; Submitted on the Record;
Issued June 6, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

On December 8, 1998 appellant, then a 41-year-old supply transportation staff member, filed a claim alleging "harassment when deployed for most of my career I would return to U. S. [United States] and ask to be less than truthful on my deployments of systems purchased or leased by the military." Appellant indicated that he first became aware of his illness on September 20, 1994 noted the nature of his illness as "high blood pressure, weakness legs," and indicated that his delay in filing his claim was due to "illness and medication" and that he had "obtained a federal attorney and can only hope certain managers will be held on criminal charges." Appellant stopped work in August 1998 and did not return.

In accompanying paperwork appellant alleged that Lt. Col. Rick Sample widely distributed offensive email criticizing unprofessional "satirical sheets" and "sticky postems," that appellant was offended by the email and responded in kind, but was untimely counseled for his general distribution response to Lt. Col. Sample's email and that Lt. Col. Sample took action against him for personal and vindictive reasons, which he felt constituted an abuse of his position. Appellant filed a grievance requesting that the harassment stop immediately and that he be reassigned.¹

Appellant alleged that Donald Lindke did not know him, did not care for his attitude and, therefore, did not want him on his team, that he sustained "a mental and savage beating of [his] character which altimetly [sic] attributed to tearing down [his] health," that managers created false rumors about his ability to perform and that innocent people were duped into making general statements about appellant's bad work habits, that when he returned from assignments he was met with hostility and resentment, that in 1993 Jeri Taylor used curse words to him and

¹ No resolution of this grievance was submitted to the case record.

denied his rights and the right to accept another position and that, after a disagreement about the use of a private vehicle for site visits, Col. Victoria Revilla sent him home early from a workshop conference.

In support of his claim, appellant submitted a March 23, 1994 memorandum from Col. Revilla which stated: “Based on your failure to comply with the [d]istribution [w]orkshop objectives, I am canceling your country clearance and directing you to return to CONUS [Continental United States] on the next available flight.”

A March 24, 1994 note from Col. Tom Hill stated that appellant “conducted himself in a totally professional manner during the time I had contact with him.”

On December 17, 1998 the employing establishment submitted a May 5, 1994 investigative memorandum, which noted as findings that Col. Revilla had the right and authority to direct the early return of any person from the workshop, that appellant obtained preapproval for his rental car and alternative visits, but that, in Col. Revilla’s absence, her next in command was unaware of any such preapproval and was unaware of any decision, by Col. Revilla to withdraw authority for appellant to conduct alternative visits. The employing establishment found that charges that appellant waited for Col. Revilla to leave her office to get his alternative agenda through were unsubstantiated.

The employing establishment found that Col. Revilla was not kept well informed and that she, therefore, assumed that appellant came to the conference with his own unapproved agenda and did not intend to comply with the objectives of the workshop. It was found that allegations that appellant inappropriately expressed displeasure at hotel accommodations were unsupported, as he merely asked if suite upgrades were available as per the sign on the registration desk. The employing establishment determined that appellant’s accuser, Mr. Beatty, merely repeated second hand gossip and had no personal knowledge on events or incidents and that he editorialized in his accusations. It concluded that Col. Revilla’s decision to send appellant home early was premature, overreactive and based on poor or incomplete information and that her immediate staff appeared to exercise greater authority over the conduct of the workshop than they were, in fact, authorized.

Appellant also submitted a May 15, 1994 memorandum from Lt. Col. Lawrence J. Dreher, which expressed his sincere regret that appellant was directed to return early from the European Distribution workshop, but noted that Col. Revilla had the right and authority to direct appellant’s early return from the workshop and that a concurring Defense Distribution Region East (DDRE) Commander honored Col. Revilla’s decision as prudent and in the best interested of appellant and the organization. Lt. Col. Dreher did state that after his investigation it appeared that appellant’s actions during the workshop appeared to be prudent and appropriate and that he believed that Col. Revilla’s decision was precipitous and based on poor or incomplete review of the facts available. Lt. Col. Dreher advised that no further investigation would be conducted and that no adverse action would be taken against appellant. He expressed his regrets that the incident occurred and that appellant may have suffered embarrassment.

In a September 1995 statement, appellant described an event in St. Croix where the local population tried to storm a barrier fence surrounding an airfield, noted that he negotiated a trade

of food, lanterns and other items if they left and indicated that, if armed guards from a protection agency had not arrived, he did not know what would have happened.

In an undated statement, Col. Ralston from Bosnia opined that appellant had clearly been among the most valuable individual contributors to the logistics success of the operation.

An April 19, 1999 report from Dr. William B. Bush, a Board-certified internist, noted:

“[Appellant’s] current debilitation is a combination of delusional and paranoid behavior as well as the current or past use or abuse of ethanol and prescription medications.

“While I am not acquainted with [appellant’s] current or past workplace environment, his main stress factor has been the workplace. The inability to work harmoniously with supervisors and coworkers and visa [sic] versa, has relegated [him] into a severe stress of anxiety, depression, panic and paranoia.”

By decision dated June 18, 1999, the Office of Workers’ Compensation Programs rejected appellant’s emotional condition claim finding that he failed to establish that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his employment. The Office found that the alleged St. Croix incident was unsubstantiated and that Col. Revilla sending appellant home from the workshop was not intentional administrative error or abuse as it was within her right and authority and as the DDRE Commander honored her decision as being prudent and in the best interests of appellant and the DDRE. The Office further found that appellant’s allegations regarding the occurrence of false rumors concerning his work habits, regarding a hostile work environment, regarding being cursed at and being told he was not wanted, were unsupported by corroborating evidence. The Office found that the email appellant complained of was merely an administrative/personnel matter and lacked evidence of error or abuse. The Office also found that requiring appellant to provide medical documentation for a requested transfer to DCST/Africa was an administrative/personnel matter without evidence of error or abuse.

By letter dated July 6, 1999, appellant, through his representative, requested an oral hearing. A hearing was held on November 23, 1999, at which appellant and several subpoenaed witnesses testified.

In support of his hearing request, appellant submitted a December 9, 1999 statement from Richard Achey, the union chief steward, which noted that it was apparent that Mr. Lindke had a bad attitude about his job and about appellant, that being sent home from the European conference caused appellant a large amount of anxiety and embarrassment and that he was aware “of a number of occasions when [appellant] was treated in a disparate manner regarding call off procedures.”

Several medical reports were also submitted: a January 26, 1999 report from Dr. Bush stated that he was “treating [appellant] for an anxiety/panic disorder which I thought stemmed from his employment. Having been off work for a relatively long time, he has shown little, if any, improvement.” Dr. Bush opined that appellant was totally disabled.

A July 21, 1999 report from Dr. Steven C. Sinderman noted that appellant “sought treatment due to excessive stress and concerns associated with his work environment. Multiple incidents involving supervisors and coworkers during his time of employment have led to significant anxiety and mood fluctuations. His diagnoses are bipolar disorder and benzodiazepine dependence, which together prevent him from being able to effectively work.” In an August 12, 1999 report, Dr. Sinderman noted that appellant “found his workplace to be hostile and complained of harassment by his coworkers and superiors,” that he experienced anxiety “associated with what he considered to be wrongful actions by his employers,” and that he “consistently relates that his feelings of anxiety and depression are related to what he sees as injustices done by his employers.” Dr. Sinderman opined that appellant’s condition was “work related in nature and is substantially aggravated by his employment with defense logistics.”

At the hearing Gertrude Wilkerson, a former coworker, testified that personnel at the depot below them, Susquehanna, did not want to deal with appellant and that they would call appellant’s boss and ask that appellant not call down there again, which frustrated appellant. She further testified that, when several people went abroad, every one was sent their own computer except for appellant, that management would not send appellant his computer and that she had to pack up his computer and send it to him. Ms. Wilkerson testified that office policy was that when a person was calling off work, a supervisor had to be found for the call, that several other people would call in and just leave messages, but that, when appellant called in, he would have to wait for a supervisor. Ms. Wilkerson also testified that Ms. Taylor insisted that she did not want appellant calling down there telling her people things.

John J. Dennis, Sr., a coworker, testified that he could call in and leave a message with the secretary, but that appellant would have to call in and speak directly with the colonel. Mr. Dennis described an incident where appellant was supposed to accompany Lt. Col. Sample and Gail Majors to Ft. Belvoir, that they were supposed to leave at a designated time, that appellant may have been running late and that Lt. Col. Sample pulled the car away just as appellant was reaching for the door handle to get in, leaving appellant standing there.

Leroy J. McClain, a coworker, testified that he could call in and leave a message with the secretary, but that appellant would have to call in and speak directly with the colonel. Mr. McClain stated that he did not know why this was. Mr. McClain testified that he overheard comments about how glad people were that appellant was away, gone or deployed and he opined that the military personnel disliked appellant most.

Finally, appellant testified that the harassment started in Germany when one of the ladies there just did not like him, when a note advising him to leave Germany was slipped under his door and when he “was singled out of getting on a bus,” and that he began getting high blood pressure at that time. Appellant claimed that he had to undergo a lot of surgeries and when he called in sick, the secretary was sarcastic. Appellant claimed that out of 107 people he was the only one who had to talk with a supervisor when he called in. Appellant claimed that he was ill-treated and refused help when deployed, that he was accused of not going for training when he had gone and that he was required to submit supporting evidence of his participation in the training. Appellant testified that Ms. Taylor used swear words to him, that her people did not want him involved, that she had friends in headquarters and that was where it started.

By decision dated February 10, 2000, the hearing representative affirmed the June 18, 1999 decision, finding that appellant had failed to implicate any compensable factors of employment in the development of his emotional condition. The hearing representative found no corroborating evidence of any of appellant's allegations of harassment by the employing establishment and that his reactions to administrative and personnel matters, absent evidence of error or abuse, were self-generated.

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.³

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition, which will be covered under the Federal Employees' Compensation Act. Generally, speaking when an employee experiences an emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁴ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Id.*

⁴ *Donna Faye Cardwell*, *supra* note 2; see also *Lillian Cutler*, 28 ECAB 125 (1976).

coverage of the Act.⁵ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be “in the performance of duty.”⁶

When working conditions are alleged as factors in causing 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 When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁸ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.⁹ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant’s emotional condition, then the medical evidence of record need not be considered.

In the present case, the Office properly found that the causative factors appellant implicated in the development of his emotional condition were not compensable factors of employment.

In this case, appellant did not allege that he developed an emotional condition arising out of his regular or specially assigned duties, or out of specific requirements imposed by his employment. He alleged, in large part, that his condition and disability were caused by harassment from supervisors and coworkers in a variety of ways. The Board has held that actions of an employee’s supervisor or his coworkers which the employee characterizes as offensive or harassing behavior may constitute factors of employment giving rise to coverage under the Act, to the extent that the implicated disputes and incidents are established as arising in and out of the performance of duty.¹⁰ However, with regard to such allegations, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.¹¹ An employee’s charges that

⁵ *Id.*

⁶ See *Joseph DeDonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁷ See *Barbara Bush*, 38 ECAB 710 (1987).

⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ See *Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹⁰ See *Lillie M. Hood*, 48 ECAB 157 (1996); *Marie Boylan*, 45 ECAB 338 (1994); *Gregory J. Meisenburg*, *supra* note 9; *Sylvester Blaze*, 42 ECAB 654 (1991).

¹¹ *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

he or she was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹² Words and actions that appellant implicated as being harassment include his perception of having his character savagely beaten, having managers create false rumors about his ability to perform, having innocent people duped into making general statements about his bad work habits, being met with hostility and resentment when returning from deployment, being cursed by Ms. Taylor, being gossiped about by Mr. Beatty and by other coworkers, being told that he was not wanted, being in a hostile work environment, having a note slipped under his door in Germany advising him to leave the country, being refused help when he was deployed and being ill treated when he returned home. Several of these incidents and allegations could possibly rise to the level of compensable harassment if they were indeed proven, but the Board finds that appellant has failed to submit adequate documentation of the occurrence, in the form of specific, reliable, probative and substantial evidence, of these events to the case record. Accordingly, the Board finds that these allegations cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them.

Many of appellant's other allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,¹³ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.¹⁴ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: receiving an email from Lt. Col. Sample criticizing unprofessional "satirical sheets" and "sticky postems," being counseled about responding to this email inappropriately,¹⁵ not being selected for Mr. Lindke's team,¹⁶ being denied the opportunity to accept another position,¹⁷ being sent home early from a workshop,¹⁸ being required to provide medical documentation for a requested

¹² See *Anthony A. Zarcone*, 44 ECAB 751 (1993).

¹³ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁴ See *Richard J. Dube*, 42 ECAB 916 (1991).

¹⁵ See *Gregory N. Waite*, 46 ECAB 662 (1995) (Disciplinary matters pertain to actions taken in an administrative capacity).

¹⁶ See *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995) (Type of work assigned is an administrative matter).

¹⁷ See *Ronald C. Hand*, 49 ECAB 113 (1997) (Denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment).

¹⁸ Although the record contains post investigation statements from a superior officer, which conclude that this action was taken prematurely and based on poor or incomplete information, the investigating officer also found that

transfer,¹⁹ being required to report all sick out days to a supervisor,²⁰ being asked not to call the Susquehanna depot or to call Ms. Taylor's people, not being initially sent his own computer while deployed and being required to submit documentation of training class attendance.²¹ Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions and, therefore, they are not compensable now under the Act.

Appellant further alleged that the incident in St. Croix caused stress, however, there was no factual corroborative evidence in the record that the St. Croix events occurred as alleged. Therefore, it has not been demonstrated to have occurred as alleged and is not now compensable under the Act.

Mr. Achey, appellant's union steward, opined that Mr. Lindke had a bad attitude about appellant, but no specific incidents were identified. Therefore, this is not a compensable factor under the Act.

Mr. Dennis reported the incident he witnessed where appellant was late for a designated departure and Lt. Col. Sample pulled away in his car just as appellant reached for the door handle, leaving appellant standing there. There has been no evidence submitted to indicate that this observed incident was anything more than an unfortunate accident. As appellant sustained no reported physical injury from this incident, it is, therefore, not a compensable factor of employment for compensation purposes.

As appellant has failed to establish that his condition was caused or aggravated by any compensable factors of his employment, the medical evidence of record need not be considered.

Accordingly, the February 10, 2000 and June 18, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 6, 2001

it was well within Col. Revilla's rights and authority and that it was an administrative decision concurred with by the DDRE Commander as being prudent and in the best interests of appellant and the organization. Therefore, no administrative error was demonstrated.

¹⁹ See *Lillie M. Hood*, *supra* note 10; (Directed medical examinations or medical documentation provision are an administrative/personnel requirements).

²⁰ This was admittedly a procedural requirement of the job which was merely disregarded by certain employees and their supervisors.

²¹ See *Dinna M. Ramirez*, 48 ECAB 308 (1997) (Attendance matters are administrative functions and not duties of the employee).

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member