

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TALAAT Y. SOLIMAN and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT AUDIT AGENCY, Huntington Beach, CA

*Docket No. 00-2376; Submitted on the Record;
Issued December 31, 2002*

DECISION and ORDER

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

The issue is whether appellant sustained an emotional or cardiac condition while in the performance of duty.

In early 1999 appellant, then a 62-year-old senior auditor, filed occupational disease claims alleging that he sustained emotional and cardiac conditions due to various incidents and conditions at work. He alleged that he was harassed and discriminated against due to his politics and ethnic background. Appellant claimed that the employing establishment retaliated against him for filing grievances and treated him differently than other coworkers. By decision dated July 14, 1999, the Office of Workers' Compensation Programs denied his claim on the grounds that he did not establish any compensable employment factors. By decision dated and finalized March 31, 2000, an Office hearing representative affirmed the Office's July 14, 1999 decision.

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional or cardiac condition in 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. 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.¹ 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.²

¹ 5 U.S.C. §§ 8101-8193.

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

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.³ 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.⁴

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.⁵ 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.⁶

In the present case, appellant alleged that he sustained emotional and cardiac conditions as a result of a number of employment incidents and conditions. The Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. 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 Fred Lang, a supervisor, wrongly gave him a performance rating in June 1998 of "minimally successful" after he received higher ratings for many years. He asserted that Mr. Lang improperly placed him on a performance improvement plan. Appellant claimed that in November and December 1998 supervisors unfairly prevented him from using official duty time to prepare appeals in connection with grievances he had filed against the employing establishment. He asserted that Mr. Lang mishandled various aspects of his work assignments, including the number of assignments and number of budget hours. He claimed that he reported "violations" regarding work assignments, but that his supervisors did not care. Appellant asserted that Wayne Everett, a supervisor, issued a memorandum on December 10, 1998 which unfairly criticized his performance. He claimed that Mr. Everett failed in his responsibility to manage the assignment of work to auditors and consequently wasted government funds. Appellant asserted that in several instances, Mr. Everett did not allot the proper number of hours to work on audits. He claimed that the employing establishment did not properly monitor the ratio of supervisors to auditors.

Regarding appellant's allegations that the employing establishment issued unfair performance evaluations, engaged in improper disciplinary actions, improperly managed work

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

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

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

⁶ *Id.*

assignments 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.⁷ Although the handling of disciplinary actions and evaluations, the management of work assignments 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.⁸ 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.⁹

Appellant has not submitted sufficient evidence to establish that the employing establishment committed error or abuse in connection with the above-noted administrative matters. With respect to his performance ratings, the record contains numerous employing establishment documents which explain the reasons for his ratings. Appellant filed numerous grievances in connection with the claimed employment factors, but the record does not contain any findings pertaining to these grievances which show that the employing establishment committed error or abuse. The record reveals that on one occasion appellant's performance rating was changed from "minimally successful" to "fully successful." However, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.¹⁰ Nothing in the record indicates that appellant's performance rating was changed due to any fault committed by the employing establishment. Moreover, he has not shown any error or abuse in the management of work assignment. Thus, appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

Appellant asserted that the employing establishment retaliated against him for filing Equal Employment Opportunity claims and "whistle blower" grievances with the employing establishment. He alleged that he was called "names" and embarrassed in front of his coworkers. Appellant claimed that Mr. Lang gave him a low performance rating in order to retaliate against him for criticizing management and as a means of discriminating against him on the basis of his politics and ethnic background. He asserted that Mr. Everett insulted him in front of coworkers on December 7, 1998 by wrongly claiming that he had lied about completing an audit before going on vacation. Appellant claimed that Mr. Lang accused him of lying about the number of grievances he had filed. He asserted that the employing establishment harassed him by assigning him the computer password, "sponge," which was a "dirty word" and was intended to refer to his filing of grievances. Appellant alleged that the employing establishment hired a supervisor, Peggy Evans, in order to "aggravate" him. He claimed that Mr. Everett became angry and criticized him when he discussed the handling of certain audits, but did not criticize his coworkers under similar circumstances. Appellant asserted that the employing establishment

⁷ 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).

⁸ *Id.*

⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁰ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

showed favoritism to other coworkers with respect to working standards, including the use of overtime and the handling of performance evaluations.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors 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 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 supervisors.¹³ Appellant alleged that supervisors made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided insufficient supporting evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁴ With respect to the claim that Mr. Everett called him a liar in front of coworkers, the record contains several statements in which coworkers indicated that no such accusation was made. With respect to the assignment of the computer password, "sponge," there is no evidence that this password was intended to ridicule or punish appellant as alleged. The record does not otherwise show that the assignment of this password would constitute harassment or discrimination.¹⁵ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

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.¹⁶

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

¹² *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 William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁵ Appellant filed numerous grievances in connection with the claimed harassment and discrimination, but the record does not contain any findings of these grievances which show that the employing establishment engaged in wrongdoing.

¹⁶ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

The March 31, 2000 and July 14, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
December 31, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member