U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH R. KOLLER and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

Docket No. 02-1859; Submitted on the Record;
Issued December 6, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

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

On January 29, 2001 appellant, then a 44-year-old computer specialist, filed a claim for compensation alleging that he first became aware that his stress from anxiety/depression was due to his employment on September 17, 2000. In separate statements, he stated that, since September 1998, he has been transferred 3 times and worked for over 10 different managers and has been subjected to harassment, intimidation, age discrimination, threats and violations of his right to privacy through transfers to another unit, lack of position descriptions, denial of his waiver to change his hours of work, receiving documents from the employing establishment regarding his leave status and being threatened with insubordination. Appellant stopped working January 10, 2001 and has not returned. Medical evidence documenting his condition was submitted.

Appellant's allegations, in chronological order, are as follows:

In September 1998, appellant was working for the Internal Revenue Service (IRS), Inspection Service and was informed that he would be transferred to the Treasury Inspector General for Tax Administration (TIGTA), Data Extraction Section. Appellant stated that he verbally protested this transfer, as there would be fewer opportunities for advancement, he was the senior person in his GS series and was in the top percentile for age. The transfer took place in January 1999. He was verbally told that the people in the Data Extraction Section were not in secure positions. Appellant stated that he was being placed in a position where he could not compete with the promotions/bonuses, which the people being transferred to the network side were given and, thus, had a constructive demotion. Appellant stated that this became a source of much anger, frustration and feelings that his career was over at the age of 45.

In March 2000, appellant, along with another coworker, was transferred to Systems Management East Section, as a network administrator. Appellant stated that he was relieved as he had a chance to compete for promotions/bonuses. However, his feelings of job security were short lived.

While at a planning meeting, appellant stated he was verbally told that he along with another transferred person from data extraction were being transferred back to the Audit/Investigations Section. He alleged that this announcement constituted an illegal personnel notification and was an invasion of his personal privacy. Appellant further stated that the illegal notification embarrassed him in front of his coworkers and brought back feelings of despair, hopelessness and anger along with physical symptoms.

Appellant stated that in less than 2 years he has been transferred 3 times and worked for over 10 different managers. He stated that he has never received any written notification of transfer of function and has had to inquire if personnel actions have been effected. Appellant alleged that the lack of personnel notification was in violation of the Office of Personnel Management rules governing personnel actions. He stated that his evaluation was signed by a manager who had not been in that capacity for over eight months. Appellant further stated that this was the first time in over 20 years he did not receive an award and that depressed him more.

Appellant also alleged that his transfers were in violation with Labor Relations since the GS-334 series did not exist under the audit function, the jobs would have to be announced for open competition. He further stated that the transfers might be in violation of Merit Service Principles. Appellant stated that he informed management about this on or about June 5, 2000.

On June 9, 2000 appellant stated that he received a copy of the Audit Executive Staff meeting notes, which stated that all vacancies would be filled by competitive selection as opposed to transfers. He stated that this was in direct conflict with what was happening to him and lead to more mental confusion and depression.

Appellant alleged that the organizational chart had renamed the data extraction function to Data Warehousing. He stated that out of nine hundred employees in TIGTA, only five people were subject to the transfers and job instability. Appellant reiterated that the audit function did not offer bonuses or promotions to a technical GS-14. He alleged that people with far less seniority were gathering experience towards advancement.

Although appellant stated that he never received official notification, he received notes of the Audit Executive Staff meeting on July 14, 2000 stating that he would be transferred to the Office of Workers' Compensation Programs of Audit. He alleged that this was in violation of the personnel notification rules as well as Merit Service Principles. According to the notes, appellant stated that he would be working for the Wage and Investment Programs under audit. He stated that he did not have the necessary education requirements to be an auditor, but three of the other people transferred had been auditors before. Appellant stated that the director of that function under audit was known for abusing his employees. He stated that he started to become apprehensive.

Appellant stated that on August 8, 2000, he received a federal express package at his office asking him to fill out top-secret background security clearance. He stated that he had been issued a pocket commission stating that he was an auditor. Appellant further alleged that the other employees in audit only required a simple less intrusive background investigation. He stated that he requested a classification appeal on August 9, 2000 and that the employing establishment refused to act on his request.

Appellant stated that he requested more time to fill out the extensive background paper work on September 11, 2000 because he had been out of the office for two weeks. He stated that the request was refused and he had three days to complete it. Appellant stated that the stress and pressure were becoming unbearable.

On September 12, 2000 appellant stated that he received an e-mail advising him that he was to be transferred again. He stated that he was getting very ill with increased symptoms and was out of work a lot because of insomnia.

On September 18, 2000 appellant opened an e-mail, which directed him to attend a meeting in Atlanta, Georgia the next day. The e-mail explained that the purpose of the meeting was to discuss his future in the Wage and Investment Program. Appellant stated that he was given no lead time to attend the meeting and was confused about the meeting. When discussing this over with a friend, the friend thought he was displaying erratic behavior and thought he seemed confused. Appellant went to the hospital on the morning of September 19, 2000 and was seen on an emergency basis by a psychiatrist.

On September 22, 2000 appellant received a federal express package at his home stating that he was considered insubordinate since he did not attend the meeting in Atlanta. The letter stated that he was to attend a makeup meeting on September 26, 2000 in Atlanta at 4:00 p.m. and that his tour of duty would be 6:30 a.m. to 3:00 p.m. He stated that he was ordered to attend a meeting outside the core hours that were just assigned. Appellant alleged that this was in violation of the Fair Labor Standards Act. He further stated that an audit manager had a fatal heart attack at work and he felt that working for audit was getting more dangerous when employees start dying. Appellant also stated that he had been starting work at 4:30 a.m. since management requested him in 1993 and that the change in his daily routine caused more stress. He stated that he developed a slight stutter. On October 23, 2000 appellant stated that he filed an Equal Employment Opportunity (EEO) complaint.

On October 31, 2000 appellant stated that he was transferred to the Information Systems Programs under audit. On November 1, 2000 he asked his manager whether he could return to his regular start time of 4:30 a.m. and was given verbal permission to start working those hours the following Monday. Appellant was later requested by the director of the new audit function to provide a waiver to start work that early. He stated that several people start that early and informed him that they did not have to sign any waivers. Appellant submitted a waiver on November 15, 2000, which was denied on November 21, 2000. He stated that he believed his waiver was denied because he had filed an EEO complaint. Appellant further stated that his change in hours for the third time in less than one month was a violation of the law.

On December 5, 2000 appellant stated that he filed his second EEO complaint for the change in tours of duty as well as the invalid job classification. He stated that his mental health continued on a downward spiral.

In mid December 2000, appellant stated that he had a three-hour personal interview for the top-secret clearance. He found it very intrusive, embarrassing and very stressful. He stated that this was in conflict with the inspector general memorandum, which stated that all other Audit employees were to receive less intrusive background checks. Appellant stated that, in most cases, he was being treated like an auditor, a position, which he did not qualify for, while in others, such as the background investigation, he was treated as if he was not an auditor.

Appellant asserted that he could not function anymore, provided management with a letter on January 10, 2001 explaining why he could no longer work and on January 29, 2001 advised management through a follow-up letter that he was no longer capable of work.

In a letter dated July 23, 2001, the employing establishment controverted appellant's allegations. It indicated that the IRS was reorganized in 1998 and the Office of Treasury Inspector for Tax Administration was created. It noted that practically every employee was impacted to some extent by the new organizational decisions. It noted that because TIGTA was no longer organized as regional offices except for a short transition period, all computer-related personnel of the former organization were reorganized so that they reported to a more centralized information technology structure, managed directly out of the Washington headquarters office. During and after this transition in organization structure, appellant's basic duties and responsibilities did not change except for the brief period when he was assigned to the Systems Management, East unit. This was done in response to a management projection that TIGTA would not be doing the extensive data extraction that it had previously assumed and that the function would be given to the IRS instead. During approximately mid-2000, the employing establishment noted that they reassigned some of their more experienced data extraction resources to direct management control of the audit and investigations executives. Appellant and six other computer specialists who previously provided data extraction support were reassigned to the Office of Audit and Office of Investigations. In approximately July 2000, appellant and four other data extraction computer specialists were distributed among three of the four Office of Audit Business Units. After approximately four months, when the audit executives realized that this was probably not the best organization structure for the EDP data extraction staff, as they often needed the skills of a computer specialist assigned to another audit business unit, the data extraction resources were polled into one group and managed by an audit executive who would control and assign the use of these resources based on requests from the other audit executives. The employing establishment stated that appellant's expertise is in data extraction and after a brief stay in network, he was transferred to audit based on the fact that his skills as a mainframe programmer were exactly those that would be required to support audit activities. It noted that, as a considerable amount of training was required to bring appellant up to speed on network operations, he was reassigned to the position in audit where his skills could be fully utilized.

The employing establishment stated that both immediately prior to and since transition to the new TIGTA organization, employee performance evaluations were done on a pass/fail

evaluation system. It stated that appellant had been provided with written critical elements for his assignments and has been evaluated and rated with a "pass" during each of his rating periods.

Regarding the work schedule, the employing establishment noted that, effective October 7, 1999, the TIGTA Personnel Policy Manual was issued and applied to all employees. One of the subjects in the manual included policy and procedure for administering hours of duty and absence and leave for employees. The employing establishment noted that the daily tour-of-duty for all full-time employees, except those on alternative work schedules, consisted of eight working hours Monday through Friday. It stated that tour-of-duty may not begin before 6:30 a.m. and may not end after 6:00 p.m. These hours were also applicable to those employees on an alternative work schedule and on a compressed work schedule. Based on these guidelines, the employing establishment asserted that appellant's manager could reject his request for a 10-hour workday to begin at 4:30 a.m. The employing establishment noted that appellant choose a compressed work schedule with his tour of duty to be 6:30 a.m. to 5:00 p.m. Monday through Thursday. It noted that, while employees are offered the opportunity to work alternative work schedules, there are times when it will not be honored. In appellant's case, the employing establishment stated that this would include any times that he might be required to travel for meetings or other assignments, such as the call to meet in Atlanta. Management does not regard such assignments and appointments as an infringement on the alternative work schedule.

Regarding appellant's allegations of discrimination, the employing establishment stated that all decisions on assignments were based on the knowledge, skills and abilities of the employees as well as their geographical locations. In addition to appellant, several other computer specialists doing data extraction were reassigned to audit and one was reassigned to investigations. The employing establishment noted that all the decisions to reassign staff falls within executive management.

Regarding appellant's allegations of threat of insubordination, the employing establishment stated that appellant was requested to complete the necessary forms so that he could attend a needed out-service training class and, after a series of communications between appellant and his acting supervisor, he stated that he would have to consult his attorney before responding. On December 14, 2000 appellant's supervisor directed him to prepare the forms by December 18, 2000 and was notified that failure to comply would be considered insubordination. Appellant prepared and submitted the forms on December 14, 2000. A similar situation occurred pertaining to appellant's fiscal year (FY) 2000 annual performance evaluation, Personal Impairment Certification, Taxable Travel Certification forms and his FY 2001 performance plan and critical elements whereby he was directed to return the signed documents by a certain date and had to be notified that failure to comply with request would be considered insubordination. Appellant signed and returned the documents a few days before the requested date.

The employing establishment further noted that, after waiting approximately two weeks for information on appellant's leave status, it had sent him a Federal Express package with a memorandum inquiring about his leave status. This was done with the intent to keep appellant informed of his responsibilities and the impact on his benefits and other opportunities available to him, such as advanced sick leave consideration, leave transfer from other employees.

Documentation of the employing establishment's statements were attached.

By decision dated August 14, 2001, the Office denied appellant's claim on the grounds that his emotional condition was not sustained while in the performance of duty. The Office determined that none of the factors alleged by appellant were compensable factors. By decision dated April 9, 2002, an Office hearing representative affirmed the August 14, 2001 decision.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

As the Board observed in the case of *Lillian Cutler*,[1] workers' compensation law does not cover each and every illness that is somehow related to one's employment. When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from his or her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his or her work. On the other hand, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from 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.

The Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. The Board has also generally held that allegations alone by a claimant are insufficient without evidence corroborating the allegations.[2] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[3]

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Federal Employees' Compensation Act.[4] Error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter may afford coverage.[5] To establish entitlement to benefits, a claimant must

[1] 28 ECAB 125, 129-31 (1976).

[2] *Joe E. Hendricks*, 43 ECAB 850, 857-58 (1992).

[3] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

[4] *See Norman A. Harris*, 42 ECAB 923 (1991); *Samuel F. Mangin*, 42 ECAB 671 (1991).

[5] *Id. Kathleen D. Walker*, 42 ECAB 603 (1991); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[6]

Appellant attributes his claimed condition to actions taken by the employing establishment during a period of transition when the new TIGTA organization was formed, whereby he was transferred to various units. The employing establishment's reorganization and appellant's various transfers and reassignments,[7] the writing of appellant's position description and evaluation as pass/fail,[8] his use of leave and the employing establishment's concern thereof,[9] denial of a request for a waiver of appellant's tour of duty,[10] the employing establishment's request to attend a meeting,[11] the denial of management to approve a request for an extension to complete a security clearance questionnaire along with questions associated with appellant's security clearance and the security interview[12] and filing of an EEO complaint,[13] involve administrative or personnel matters and are not covered by the Act. Coverage may be afforded where evidence demonstrates that the employing establishment either erred or acted abusively in the handling of administrative matters.[14]

Appellant has not provided any evidence that the employing establishment acted unreasonably with respect to these allegations. The employing establishment asserted that all transfers and assignments during the transition and subsequent reorganization period were based on the knowledge, skills and abilities of the employees as well as their geographical locations. No evidence has been submitted by appellant to contradict this. Neither has evidence been submitted to show that the employing establishment had violated any laws with regards to transfers, assignments, position descriptions or performance evaluations. The employing establishment admitted that both immediately prior to and since transition to the new TIGTA organization, employee performance evaluations were done on a pass/fail evaluation system. The record indicates that appellant successfully "passed" each evaluation. Additionally, no evidence has been submitted by appellant to support that he was effectively demoted by being transferred to the audit/investigation section.

Although appellant stated he had a verbal understanding that he could begin his work schedule at 4:30 a.m., the employing establishment did not honor appellant's subsequent request

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[6] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[7] *Peggy Ann Lightfoot*, 48 ECAB 490 (1997).

[8] *See Jose L. Gonzales-Garced*, 46 ECAB 559 (1995).

[9] *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510 (1993).

[10] *James W. Griffin*, 45 ECAB 774 (1994).

[11] *See Janet I. Jones*, 47 ECAB 345 (1996); *Michael Thomas Plante*, *supra* note 9.

[12] *See Janet I. Jones*, *supra* note 11.

[13] *Diane C. Bernard*, 45 ECAB 223 (1993).

[14] *James W. Griffin*, *supra* note 10.

for waiver on the basis that such a waiver would interfere with work production and was outside the tour-of-duty hours of 6:30 a.m. to 6:00 p.m. No contrary evidence was provided.

Although appellant asserted that the request for him to attend the Atlanta meeting was outside his working hours, the employing establishment stated that, while employees are offered the opportunity to work alternative work schedules, there are times when it will not be honored. In appellant's case, the employing establishment stated that this would include any times that he might be required to travel for meetings or other assignments, such as the call to meet in Atlanta. Such assignments and appointments were not regarded as an infringement on the alternative work schedule.

The Board has also held that disciplinary matters such as discussion or letters of warning for conduct[15] and investigations[16] do not constitute a compensable factor of employment. Although appellant felt that he was threatened with insubordination, the record reflects that he was never charged with insubordination. Moreover, the employing establishment explained the situations whereby he was notified that failure to complete a requested task within an appropriate time would be considered insubordination. Accordingly, appellant has not established a compensable factor. Moreover, although he alleged that he was scrutinized more severely than other employees when investigations were conducted in connection with his security clearance status, no evidence had been offered to support this allegation.

Appellant's emotional reaction from the above-discussed factors arises from a frustration at not being able to work in a particular environment, which is not related to the performance of his work. The Board has long held, however, that frustration from not being permitted to work in a particular environment is not covered under the Act.[17]

Next, appellant attributes his claimed condition to discrimination. A mere perception of harassment is not compensable and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[18] In this case, there is no evidence corroborating appellant's allegation that the transfers involved some element of age discrimination and appellant has not provided any evidence that the employing establishment acted in a discriminatory manner or unreasonably.

As the record in this case fails to establish that the employing establishment erred or acted abusively or unreasonably in the administrative actions implicated by appellant, the Board will affirm the Office's April 9, 2002 decision rejecting his claim for compensation.[19]

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[15] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

[16] *Sandra F. Powell*, 45 ECAB 877 (1994).

[17] *See also Eileen P. Corigliano*, 45 ECAB 581 (1994).

[18] *See Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992); *Kathleen D. Walker, supra* note 5.

[19] As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment, the medical evidence need not be addressed. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

The April 9, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 6, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member