

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT C. TREADWAY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Beckley, WV

*Docket No. 00-2182; Oral Argument Held December 6, 2001;  
Issued February 19, 2002*

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Appearances: *Brook L. Beasley*, for appellant; *Julia Mankata, Esq.*,  
for the Director, Office of Workers' Compensation Programs.

DECISION ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
BRADLEY T. KNOTT

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

On December 20, 1996 appellant, then a 47-year-old police officer, filed an occupational disease claim for hypertension and coronary artery disease which he attributed to factors of his federal employment. He indicated that he became aware his illness was work related on October 12, 1993. Appellant also alleged that he sustained post-traumatic stress and depression due to his employment. He was treated for post-traumatic stress disorder following his discharge from the Navy in 1972. Appellant began working as a police officer for the employing establishment on October 17, 1993 and underwent a cardiac cauterization on December 29, 1994. Appellant resumed working as a police officer after the surgery.

On June 26, 1995 appellant voluntarily changed to the position of file clerk and continued working in that position until July 1995 when he underwent bypass graft surgery. He resumed working as a file clerk. In the Equal Employment Opportunity Commission (EEOC) decision dated August 16, 1999, the administrative judge found that medical documentation from May, July and August 1995 showed that it was anticipated that appellant could return to heavy work approximately three months after his July 1995 surgery. In August 1996 a vacancy for a police officer position was announced. Appellant applied for the position and was rejected. He testified at the EEOC hearing that at the time the selection was being made, his heart condition imposed no limitations upon his major life activities, including the ability to work as a police officer. Appellant stated that he was physically active in sports and hunting. He also testified that at the time of the selection he did not have any type of mental problems or impairments.

At the EEOC hearing, police officers, Donald A. Cole, Jr., Gary Buckland, and former police officer, Barry M. Shumate, testified that prior to the selection for the police officer

position in question, they heard appellant's supervisor and the chief of the Police and Security Service, Thomas Nichols, state that appellant would never come back to work as a police officer as long as Mr. Nichols was chief because of his heart condition and Mr. Nichol's fear that appellant might have a heart attack. Mr. Cole and Mr. Buckland also testified that they heard the Associate Medical Center Director, Frank Leach, state that appellant would never come back to work as long as he was the Associate Director. Appellant testified that Mr. Leach made this statement because he did not want "another Charlie Smith" incident on his hands, referring to a police officer who had a heart attack while on duty. He filed an EEOC complaint alleging that he was not selected for the police officer position due to his age and disability. The employing establishment terminated appellant in August 1997.

By decision dated July 3, 1997, the Office denied the claim, finding that appellant did not establish any compensable factors of employment, and therefore failed to establish that he sustained an emotional condition in the performance of duty. Appellant requested an oral hearing before an Office hearing representative which was held on September 9, 1998. By decision dated November 23, 1998, the Office hearing representative affirmed the Office's July 3, 1997 decision.

By letter dated November 18, 1999, appellant requested reconsideration of the Office's decision and submitted the EEOC decision dated August 16, 1999. In the decision, the EEOC found that the employing establishment unlawfully discriminated against appellant based on his disability but not based on his age when in September 1996 he was not selected for the position of police officer, GS-0083-05. The administrative judge stated that appellant's disability consisted of coronary artery disease and major affective disorder or anxiety and depression. For equitable relief, the EEOC awarded appellant back pay, with interest, from the date appellant would have been placed in the police officer position until the date of approval of his disability application. The EEOC also awarded appellant nonpecuniary compensatory damages in the amount of \$17,500.00.

By decision dated December 20, 1999, the Office modified its prior decision, stating that appellant had established a compensable factor of employment in that the employing establishment discriminated against appellant in its selection process for the police officer position. The Office found, however, that the medical evidence was insufficient to establish that appellant's condition of coronary artery disease, post-traumatic stress disorder and depression was due to the factor of employment, and denied appellant's request for modification.

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 her 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.<sup>1</sup> On the other hand, the disability is not covered where it results from such factors as an

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

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.<sup>2</sup>

Where an employee alleges harassment or discrimination and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.<sup>3</sup> The issue is not whether the claimant has established harassment or discrimination under standards applied by the EEOC but whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.<sup>4</sup> To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.<sup>5</sup>

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>6</sup> However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.<sup>7</sup>

In this case, appellant established a compensable factor of employment in that the EEOC decision dated August 16, 1999 establishes that management unlawfully discriminated against appellant based on his disability. The EEOC awarded appellant back pay from the time the selection for police officer was made through appellant's disability retirement and awarded him nonpecuniary compensatory damages of \$17,500.00. Appellant testified at the EEOC hearing that at the time of the selection for the police officer position, he had no physical or mental impairment, and in fact was participating in sports and hunting. The testimony of the police officers, Mr. Cole, Mr. Buckland and Mr. Shumate, that prior to the selection of the police officer for the position in question, Mr. Nichols stated he would not rehire appellant because of his disability and Mr. Cole and Mr. Buckland's testimony that Mr. Leach also stated that he would not rehire appellant shows that management was biased against appellant. The Board has held that failure to obtain a particular job is an administrative matter and as such is not compensable unless management acted unreasonably or abusively.<sup>8</sup> Here, however, appellant has shown through the EEOC decision that management acted unreasonably in rejecting him for the police officer position for which he was professionally qualified and was physically and mentally capable of performing.

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<sup>2</sup> *Clara T. Norga*, 46 ECAB 473, 480 (1995); see *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>3</sup> *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

<sup>4</sup> See *Martha L. Cook*, 47 ECAB 226, 231 (1995).

<sup>5</sup> *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

<sup>6</sup> *Clara T. Norga*, *supra* note 2 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

<sup>7</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>8</sup> See *Ronald C. Hand*, 49 ECAB 113, 155 (1997).

Appellant's burden of proof is not discharged by the fact that he has identified an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the identified compensable employment factor, in this case, the employing establishment's rejecting appellant for the position of police officer based on disability.<sup>9</sup>

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.<sup>10</sup> In this case, since appellant established a compensable factor of employment, the case must be remanded for the Office to make additional findings on the medical evidence. On remand, the Office should draft a detailed statement of accepted facts. The Office should refer appellant with the statement of accepted facts and the case record for examination by a psychiatrist and cardiologist to determine whether the factors outlined in the statement of accepted facts would have caused or aggravated appellant's underlying emotional condition or would have caused sufficient stress and anxiety to precipitate an emotional condition. After further development as it deems necessary, the Office should issue a *de novo* decision.

The Office of Workers Compensation Programs' December 20, 1999 decision is vacated and the case remanded for further action consistent with this decision.<sup>11</sup>

Dated, Washington, DC  
February 19, 2002

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Clara T. Norga*, *supra* note 2 at 482-83; see *William P. George*, 43 ECAB 1159 (1992).

<sup>10</sup> *Ezra D. Long*, 46 ECAB 791, 796 (1995); *Mark A. Cacchione*, 46 ECAB 148, 152 (1994).

<sup>11</sup> The Board notes that Bradley T. Knott who participated in the hearing held on December 6, 2001 was not an Alternate Board Member after January 26, 2002 and he did not participate in the preparation of this decision and order.