U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of ELBERT V. BROOKS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Seattle, WA

*Docket No. 03-1512; Submitted on the Record;*
*Issued August 14, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained a stress-related aggravation of his preexisting diabetes and related conditions.

This case is before the Board for the second time. In the first appeal, the Board affirmed the Office of Workers' Compensation Programs' November 23 and August 11, 1999 decisions finding that appellant had not met his burden of proof to establish that he sustained an aggravation of his preexisting diabetes due to the identified compensable factors of employment.[1] The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On February 25, 2002 appellant requested reconsideration of his claim. In a decision dated May 20, 2002, the Office denied modification of its prior merit decision. On August 7, 2002 the Office reissued its May 20, 2002 decision after correcting a typographical error.

In a letter dated August 29, 2002, the Office noted that appellant had requested reconsideration before the Board on January 29, 2002. The Office found that its May 20, 2002 decision was null and void as the Board has jurisdiction of the case.[2]

On September 24, 2002 appellant again requested reconsideration. By decision dated May 1, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of the prior merit decision.

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[1] The Board found that appellant had established interacting with the public and receiving a death threat from a client as compensable factors of employment. The Board found that he had not established that monitoring by his supervisor, performance ratings, sick leave matters and disciplinary actions or verbal abuse constituted compensable employment factors. The Board also found that he had not established harassment or discrimination by his supervisor, Vickie Klein. *See Elbert V. Brooks*, Docket No. 00-772 (issued January 2, 2002).

[2] By letter dated October 22, 2002, the Office informed appellant that it was transferring his case from the Branch of Hearings and Review as there was no evidence that he had requested a hearing.

The Board finds that appellant has not established that he sustained a stress-related aggravation of his preexisting diabetes and related conditions.

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.[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 support of his request for reconsideration, appellant submitted a copy of a July 1, 1999 agreement settling his Equal Employment Opportunity (EEO) discrimination complaints against the employing establishment. 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

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

[6] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[8] *Id.*

factors.[9] 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.[10] In this case, appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[11] The July 1, 1999 settlement agreement provided that the employing establishment would change a removal action against appellant into a "resignation for medical reasons." However, the mere fact that personnel actions are later modified or rescinded does not in and of itself, establish error or abuse.[12] Appellant also submitted a statement dated September 24, 2002 from Kate Buckley, a coworker, who described problems between appellant and management and an altercation between him and a coworker.[13] She stated that management "appeared to want [appellant] gone." Ms. Buckley also described allegations by members of the public that appellant had abused his position. She, however, did not provide any definite examples of harassment or discrimination by management against him. Appellant further submitted a statement dated February 25, 1999 from Frances X. Allard, who described a conversation between managers, in which they mentioned him as a "problem" employee. He, however, did not identify any specific manner in which appellant was harassed or discriminated against by management. Appellant, therefore, has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant has established as compensable factors of employment that he sustained job stress due to interacting with the public and receiving a death threat. However, his burden of proof is not discharged by the fact that he has established 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 accepted compensable employment factor.[14]

Appellant submitted a report dated July 19, 2000 from Dr. Edward A. Benson, a Board-certified internist and his attending physician, who diagnosed "diabetes mellitus, complicated by eye, kidney and nerve disease." He stated:

> "For people with diabetes, it is important [that] they be allowed to follow a regular schedule and diet, exercise and glucose monitoring. This was difficult for [appellant] to achieve when he was working in his job doing stressful interviews on a daily basis."

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

[10] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[11] *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).

[12] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[13] The Board previously determined that the altercation between appellant and a coworker on November 26, 1996 was not a compensable factor of employment.

[14] *See William P. George*, 43 ECAB 1159, 1168 (1992).

Dr. Benson further stated:

> "[M]y feeling is that the job which [appellant] was employed to do, when he last worked, was extremely stressful to him and that as a consequence of that, it probably resulted in worsened diabetes control. The exact role that his job played in producing his current complications [are] impossible to judge, but it would be unwise for him to resume his job, given the great deal of stress that was inherent in that work environment."

Dr. Benson's finding that job stress "probably" worsened control of appellant's diabetes is speculative and equivocal in nature and thus, of little probative value.[15] Further, he opined that it was "impossible to judge" whether appellant's employment aggravated his diabetes and, therefore, his report is insufficient to meet appellant's burden of proof.

In a report dated March 27, 2002, Dr. Benson noted that appellant's condition had not changed. In a report dated July 2, 2002, he indicated that he had enclosed a previous letter regarding the relationship between appellant's diabetes and his employment. As Dr. Benson did not attribute appellant's condition to the identified compensable factors of employment, these reports are of little relevance to the issue at hand.

By letter dated August 12, 2002, Dr. Benson stated:

> "[Appellant] has once again asked me to write to you regarding his diabetes and how it was affected by his previous employment. I have only been involved with [his] care since he retired from his government position, so I can only comment on what I have observed directly."

Dr. Benson described the improvement in appellant's hemoglobin and overall management of diabetes. He stated:

> "As you know, [appellant's] contention is that the stress of his job exacerbated his diabetes and, therefore, made him more likely that he would develop complications from the disease.
>
> "I can verify that since he has retired from his position that his diabetes control has improvement substantially."

Dr. Benson, however, did not specifically attribute an aggravation of appellant's preexisting condition to factors of his federal employment, but rather noted his belief that his work aggravated his diabetes. Further, Dr. Benson did not discuss any of the employment factors identified by appellant as causing his condition. Consequently, his opinion is insufficient to establish that appellant sustained an emotional condition in the performance of duty.

[15] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

In a report dated December 17, 2002, Dr. Benson stated:

> "Once again, [appellant] has asked me to communicate with you regarding his disability claim, specifically to state how stress on the job could worsen his diabetes control. As you know, you have previously received communication from both me and Dr. Fredlund regarding [appellant]. Dr Fredlund was his physician during the time that he was in the employment situation and I have no direct information on [appellant's] response to his job since this occurred before I became his physician. Nevertheless, from his medical records, it is apparent that he did find his job stressful and as to how this could affect his diabetes, the connection is that stress, whether it be physical or emotional, can elevate certain hormones, namely epinephrine and cortisol. These hormones in turn elevated an individual's blood sugar. Elevated blood sugar is a factor in the development of diabetic complications. Thus, this is a physiological mechanism by which stress can exacerbate diabetes control."

Dr. Benson's finding that appellant perceived his job as stressful and that stress "can exacerbate" diabetes is speculative and inconclusive in nature and thus of little probative value.[16] Additionally, he failed to identify specific factors that caused appellant's condition. Instead, Dr. Benson indicated that he did not have "direct information" on the relationship between appellant's job stress and any aggravation of his diabetes because he was not appellant's attending physician during the time he worked for the employing establishment. To be of probative value, a physician's opinion regarding the cause of a stress-related condition must relate that condition to the specific incidents accepted as compensable employment factors, must be based on a complete and accurate factual history and must contain adequate medical rationale in support of the conclusions.[17]

Dr. Lawrence C. Ranier, a psychologist, provided a psychological assessment of appellant on January 16, 2001 and diagnosed an adjustment disorder with anxious and depressed mood and diabetes mellitus with complications. He noted that "perceived discrimination against [appellant]" by the employing establishment "adversely affected his diabetes control." Appellant, however, has not established that the employing establishment discriminated against him. As Dr. Ranier did not attribute appellant's diagnosed conditions to the identified compensable employment factors, interacting with the public and receiving a death threat, his opinion is of little probative value.

In a report dated January 19, 2001, Dr. Matthew J. Burke discussed appellant's allegations of discrimination by the employing establishment and found that he did not have a psychiatric diagnosis. As Dr. Burke did not provide a diagnosis or attribute any condition to

[16] *Jennifer L. Sharp*, 48 ECAB 209 (1996) (medical opinions which are speculative or equivocal in character have little probative value).

[17] *Mary J. Ruddy*, 49 ECAB 545 (1998).

compensable factors of employment, his report is insufficient to meet appellant's burden of proof.[18]

In a report dated June 4, 2002, Dr. Anthony J. Gerbino, an internist, evaluated appellant for hemoptysis and recommended a bronchoscope. He did not address the cause of appellant's condition, therefore, Dr. Gerbino's opinion is of diminished probative value.[19]

As appellant has not submitted the necessary medical evidence relating an aggravation of his preexisting diabetes to a compensable employment factor, he has not met his burden of proof.[20]

The decision of the Office of Workers' Compensation Programs dated May 1, 2003 is affirmed.

Dated, Washington, DC
August 14, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] Appellant submitted medical reports regarding his eye condition, a dietician's report, social workers' reports and laboratory data. As this evidence did not address the relevant issue of whether he sustained an employment-related aggravation of his preexisting diabetes, it is of little probative value.

[19] Appellant submitted evidence showing that the Office of Personnel Management approved his application for disability retirement and the Department of Veterans Affairs found that he was disabled due to his diabetes. However, these agencies' findings are not dispositive with regard to questions arising under the Act. *See Ernest J. Malagrida*, 51 ECAB 287 (2000). The findings by these agencies do not address the relevant issue of the cause of appellant's disabling condition and thus are of diminished probative value.

[20] Appellant submitted literature regarding the relationship between stress and diabetes, however, the Board has held that medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment. Such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee. *William C. Bush*, 40 ECAB 1064, 1075 (1989).