

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM R. DIBONA and DEPARTMENT OF AGRICULTURE,
MEAT QUALITY DIVISION, Minneapolis, MN

*Docket No. 03-962; Submitted on the Record;
Issued December 4, 2003*

DECISION and ORDER

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

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

On November 27, 2001 appellant, a 48-year-old modified livestock market news reporter, filed an occupational disease claim alleging that he developed an emotional condition which he attributed to stress from being unable to perform his work.¹ Appellant noted that he first became aware of his illness on March 1, 2000.

In support of his claim, appellant submitted evidence of an Equal Employment Opportunity (EEO) complaint alleging discrimination and harassment due to his medical condition, denial of a leave request for the period February 2 through February 13, 1998, and a log of the livestock duties that he was required to perform.

In a report dated August 3, 2001, Dr. Peter Nasseff, an attending clinical psychologist, diagnosed depression and extreme distress. He attributed appellant's condition to "the physical pain he endures while performing his job." Dr. Nasseff also opined that appellant's current light-duty work exacerbated his medical condition which was further evidenced by his depressed mood following a painful day at the work assignment.

In a January 9, 2002 report, Dr. Joel S. Stoeckeler, an attending family practitioner, opined that appellant "had multiple myofa[s]cial and skeletal problems, depression and hearing loss" due to his August 16, 1991 employment injury. He further noted that appellant's depression was "caused by the chronic pain and associated with his myofa[s]cial and skeletal problems, hearing loss, carpal tunnel syndrome and employment issues arising from the above disabilities."

¹ The record indicates that the instant claim, adjudicated by the Office of Workers' Compensation Programs under file number 25-2007084, was developed for stress only. Appellant's orthopedic conditions were adjudicated by the Office under file numbers A16-0276161 and A10-416872.

The employing establishment, in a March 10, 2002 letter, finalized appellant's removal from his position of livestock market reporter. The employing establishment found that removal was the only option available due to appellant's "failure to attain a 'fully successful' level of performance" and the lack of other positions to which he could be reassigned. Moreover, the letters stated:

"[T]hat Mr. Van Dykes's proposal letter adequately addressed the [employment establishment's] position. I also find that the attending application for disability retirement and workman's compensation forms [that] you have filed indicate that you are unable to perform the essential functions of your position, with or without reasonable accommodation. Therefore, it is my decision to remove you from your position and the [f]ederal service *effective close of business March 22, 2002*. (emphasis in original)."

By decision dated April 24, 2002, the Office denied appellant's claim on the basis that he failed to establish that the claimed injury occurred in the performance of duty.

Appellant requested an oral hearing, by letter dated May 1, 2002 and a hearing was held on November 19, 2002. He submitted a report dated December 18, 2002 from Dr. Nasseff; reports dated February 22, 2001 as well as documents from his earlier claim including reports dated February 22 and April 5, 2001 by Dr. Jon H. Engelking, an attending Board-certified orthopedic surgeon and reports by Dr. Joel Stoeckeler, an attending Board-certified family practitioner, dated March 26 and April 4, 2001.

Dr. Nasseff noted that he had treated appellant since March 1, 2000 for depression "due to the physical pain that appellant endured while performing his market news position. He also attributed appellant's depression to chronic bilateral carpal tunnel/left shoulder impingement pain. Dr. Nasseff also noted that appellant was "bothered by [the] actions [that] the employer has requested of him[,] in a prior position offering in 1997" and opined that "[t]hese events have indeed impaired him emotionally." He noted that other actions taken by the employer, which impacted on appellant's emotional condition, included offering appellant an erroneous position in Florida and then informing appellant that he would be fired if he did not accept this position; obstructing appellant's compensation claim for his left shoulder impingement condition; "the employer had created charges against him of [AWOL] absent without official leave when the position was not accommodated as written;" appellant's separation from his family and not allowed to house hunt in Florida; and failing to pay appellant for "18 months when clearly it was not his fault [that] the position was erroneous."

In a decision dated February 24, 2003, the Office hearing representative affirmed the denial of benefits.

The Board finds that this case is not in posture for decision.

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 factors of his federal employment.² To establish appellant's claim, that he

² *Edward C. Heinz*, 51 ECAB 652 (2000); *Martha L. Street*, 48 ECAB 641, 644 (1997).

sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) 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.³

Regarding appellant's allegations, that the employing establishment wrongly denied him leave and placed him on leave without pay (LWOP), the Board finds that this allegation relates 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 Federal Employees' Compensation Act.⁴ Although the handling of leave requests and the assignment of work duties are generally related to the employment, they are administrative functions of the employer and not duties of the employee.⁵ 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.⁶ Appellant has submitted insufficient evidence that the employing establishment acted unreasonably in denying his request for annual leave for February 2 through February 13, 1998. The fact that appellant filed an EEO claim is not sufficient to establish error on the part of the employing establishment. Appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also alleged that the employing establishment improperly obstructed his compensation claim for his shoulder impingement. Dr. Nasseff, in his December 18, 2002 reports, notes the employing establishment's obstruction of appellant's compensation claim as one of the causes of his emotional condition. The Board notes that the development of a condition related to the processing of claims does not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.⁷ Although the handling of a compensation claim is generally related to the employment, it is an administrative function of the employer and not a duty 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.⁹ In this case, there is no evidence to support appellant's allegation that the employing establishment improperly interfered or obstructed his compensation claim. Thus,

³ *Ray E. Shotwell, Jr.*, 51 ECAB 656 (2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ 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).

⁵ *Id.*

⁶ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

⁷ See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

⁸ *Id.*

⁹ See *Michael L. Malone*, 46 ECAB 957, 961 (1995).

appellant has not established a compensable employment factor under the Act with respect to administrative matters

The Board notes that appellant has also alleged that he was “harassed” by his supervisors regarding his medical restrictions. A claim based on harassment or discrimination must be supported with probative and reliable evidence.¹⁰ Mere perceptions of harassment or discrimination do not constitute a compensable factor of employment.¹¹ The record contains no evidence such as witness statements supporting appellant’s allegation that he was discriminated against by the employing establishment due to his physical restrictions. Appellant has not provided sufficient detail or supporting evidence to establish a claim based on harassment in this case. Appellant has not established a compensable employment factor under the Act with respect to discrimination.

Appellant alleged that his claimed emotional condition was due in part to being made to work outside of his restrictions, particularly with his work as an agricultural reporter. The Board has held that being made to work beyond one’s physical limitations or prescribed restrictions may be a compensable factor of employment.¹² In this case, while the complete records pertaining to appellant’s carpal tunnel syndrome left shoulder impingement syndrome are not contained in the present record, the record before the Board does contain reports from Dr. Stoeckler dated March 26 and April 4, 2001 and appellant’s narrative of the duties that he had to perform while assigned to report the grain market. In his March 26, 2001, Dr. Stoeckler notes that “the repetitive writing causes him a great deal of discomfort” and recommended no handwriting for one week. Similarly, Dr. Engelking related that appellant had increasing problems with his hands which he believed was activity related. While the record before the Board is not complete on this issue, the record does contain sufficient evidence to develop the issue of whether appellant was required to work outside of his physical restrictions.

Appellant has also attributed his emotional condition to chronic pain and limitations resulting from his prior employment injuries. This could also be a compensable employment factor.¹³ In reports dated December 17, 2002 and August 3, 2001, Dr. Nasseff advised that appellant had developed a pain depression syndrome causally related to pain from performing his light-duty work and his accepted left shoulder impingement and chronic bilateral carpal tunnel syndrome. In addition, Dr. Stoeckler attributed appellant’s depression to his accepted August 16, 1991 employment injury in the physician’s January 9, 2002 report. While this evidence is not sufficient to meet appellant’s burden of proof it raises an uncontroverted

¹⁰ *Barbara J. Nicholson*, 45 ECAB 803 (1994).

¹¹ *Sharon R. Bowman*, 45 ECAB 187 (1993).

¹² *Jamel A. White*, 54 ECAB ____ (Docket No. 02-1559, issued December 10, 2002); *Kim Nguyen*, 53 ECAB ____ (Docket No. 01-505, issued October 1, 2001).

¹³ See *Clara T. Norga*, 46 ECAB 473 (1995) (an emotional condition due to chronic pain and other limitations resulting from an employment injury is covered under the Act).

inference of causal relationship between appellant's condition and the accepted employment injuries. It is, therefore, sufficient to require further development by the Office.¹⁴

The case will, therefore, be remanded for further development. On remand, the Office should combine the files from appellant's orthopedic claims, Office file number A16-0276161, A10-416872 and the instant claim, assigned Office file number 25-2007084. The Office should then submit the medical record and a statement of accepted facts to an appropriate medical specialist for a rationalized explanation of whether accepted factors of employment caused or aggravated appellant's claimed emotional condition.¹⁵ After such further development as it considers necessary, the Office shall issue an appropriate final decision on appellant's entitlement to compensation benefits.

The February 24, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
December 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁴ See *O. Paul Gregg*, 46 ECAB 624; *John J. Carlone*, 41 ECAB 354 (1989).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(6) (July 2000) (A claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted).