

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY W. WEST and DEPARTMENT OF HEALTH & HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, Joplin, MO

*Docket No. 03-632; Submitted on the Record;
Issued November 13, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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

On April 1, 2001 appellant, a 33-year-old claims representative, filed an occupational disease claim alleging that he developed an emotional condition which he attributed to harassment at work.¹ He noted that he first became aware of his illness on March 3, 2001. In a statement dated May 15, 2001, appellant detailed the incidents he believed were harassment and were the cause of his paranoia, stress, depression and anxiety. He related an incident occurring on or about January 30, 2001 involving Brenda Jagels, an employee in another office of the employing establishment and Peter P. Jaudegis, the supervisor of Ms. Jagels. Appellant related mailing a key to his personal post office box to Ms. Jagels at her workplace and that he indicated on the envelope that it was not to be opened in the mail room. Mr. Jaudegis was present when Ms. Jagels opened the envelope and at his request she gave him the key in the envelope which he used to obtain the letter and cassette tape appellant had placed in his personal post office box. Mr. Jaudegis then wrote a memorandum to Mark Sparks, appellant's supervisor, stating that appellant was sending inappropriate messages to Ms. Jagels and that he was disrupting her work. In this memorandum, Mr. Jaudegis stated that it was agreed that he would investigate the contents of the P.O. Box after Ms. Jagels brought him the letter and the enclosed post office box key. On January 30, 2001 appellant was referred to the employee assistance program based upon the investigation into his inappropriate conduct of sending messages via net send and postal mail to Ms. Jagels after she had requested he stop contacting her. Appellant also alleged that Mr. Sparks harassed him and began a vendetta against him due to his having once gossiped about Mr. Sparks' alleged extramarital affair in November or December 2000. As part of this vendetta,

¹ The Office of Personnel Management accepted appellant's claim for disability retirement by letter dated September 30, 2002.

appellant alleged that “Mr. Sparks made it his business to find out who I was ‘Net Sending’² and somehow managed to convince” Mr. Jaudegis that he was unstable and dangerous.

In a decision dated June 6, 2001, the Office of Workers’ Compensation Programs, after reviewing the evidence of record, denied appellant’s claim on the basis that he failed to establish any compensable factor of employment.

On June 21, 2001 appellant submitted a statement attributing his emotional condition to his heavy workload, use of overtime and the stress of being constantly behind in his work. In his statement appellant noted his duties included telephone calls, interviews with claimants, being the back-up for getting the mail processing cases going back years from administrative law judges as well as a multitude of other duties. He alleged that he was responsible for the daily appointments which included assigning them to coworkers, passing out all the information associated with the file, which included pulling up the case on the computer system, printing the information, associating this information with the folder and delivering “claim leads to the members of the unit. He also alleged that management would volunteer the staff to “take on work from other offices when we could n[o]t keep up with our own.” He also alleged that logging onto the telephone system so that incoming calls were not screened and that “we became receptionists for everything from replacement Social Security Cards, name changes,” etc. Thus, appellant alleged that due to this procedure of logging on to the telephone system this caused him to be overburdened with an “unworkable amount of [tele]phone calls.” Appellant also submitted a June 14, 2001 report by Dr. David R. Trobaugh, an attending osteopath, who diagnosed obsessive compulsive disorder and major depression with paranoid features which he attributed to appellant’s problems at work and belief that his supervisor “was out to get him.”

In a report dated September 4, 2001, Dr. Steven M. Kory, a second opinion Board-certified psychiatrist, diagnosed narcissistic personality traits and adjustment disorder with depressed and mixed anxiety mood. Dr. Kory opined that appellant’s “current difficulties and job dissatisfaction are mainly related to his underlying personality traits, with strong narcissistic traits” and that appellant “tends to blame others for his own inadequacies and often feels he is being treated unfairly or unjustly.” In concluding, he stated that appellant’s employment was not the cause of his current condition.

By decision dated September 18, 2001, the Office set aside the June 6, 2001 decision and found appellant had established a compensable factor regarding his daily workload and job duties. With regards to the compensable factor of overwork, the Office found that appellant had a heavy workload and was constantly falling behind; that he had constant interruptions of telephone calls, upset claimants, congressional inquiries and occasional screaming by adults or children; he was responsible for the daily appointment assignments; that he had the duty of assigning quiet time which was done by a rotation system; he was responsible for picking up the mail; that his work assignments were changed when the calls were no longer screened and he had to answer all incoming calls; that his cases were removed by a desk audit and placed in the conference room where anyone could see them; that management added additional work by volunteering the staff to do work from other offices. However, the Office denied the claim on

² Net sending appears to be an internal email system. Ms. Jagels in an undated memorandum references “net sends on my workstation.”

the basis that the medical evidence was insufficient to establish his emotional condition was causally related to the accepted factor.

Appellant, through his counsel, requested a hearing which was held on May 21, 2002. Appellant submitted additional medical evidence prior to the hearing.

In a December 12, 2001 report, Dr. Trobaugh opined that “a series of events at work last year precipitated an exacerbation of his disorder.” Specifically, the physician noted:

“The information he was receiving from the coworker and the information and lack of information he was receiving from his supervisors, confused him and further increase his paranoia. He was livid, thinking his supervisors had over stepped their authority and were illegally looking into his personal life. He was further led to believe that this was an effort on the part of the supervisor to force him out. This as a result of misinformation supplied by a coworker.”

In a January 24, 2002 report, Dr. Robert D. Forsyth, a licensed psychologist, concluded that appellant’s “preexisting condition was exacerbated, accelerated and aggravated in his depression, personality disorder and obsessive compulsive behavior by events that occurred at his work resulting in decompensation and narcissistic rage.” Specifically, Dr. Forsyth attributed appellant’s exacerbation to “‘management’ misunderstanding and performing an investigation into his relationship with a fellow employee and opening a post office box without his permission” and appellant’s allegation that “the management investigation was retaliatory due to prior rumor incident involving his supervisor and his belief that the supervisor was ‘trying to get back at me.’”

In a decision dated August 26, 2002, the hearing representative affirmed the September 18, 2001 decision denying appellant’s claim.

Appellant, through his attorney, requested reconsideration on September 12 and October 7, 2002 and submitted additional evidence in support of his claim.

By decision dated October 30, 2002, the Office denied modification of the August 26, 2002 decision.

The Board finds that appellant has not established that he sustained an emotional condition while in the performance of duty.

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.³ To establish appellant’s claim that he 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;

³ *Edward C. Heinz*, 51 ECAB 652 (2000); *Martha L. Street*, 48 ECAB 641 (1997).

and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁴

The initial question presented is whether appellant has alleged and substantiated compensable factors of employment as contributing to his emotional condition. In this case, appellant attributed the claimed emotional condition, in part, to being investigated for sexual harassment of Ms. Jagels. However, the Board has held that disciplinary charges, investigations and related meetings, which are administrative functions of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.⁵ The mere fact that an investigation was conducted does not establish error or abuse.⁶

In this case, appellant has not demonstrated that the investigation was a part of his regular duties or that he had been specially assigned any task related to the investigation. While appellant has submitted evidence from Ms. Jagels stating that he had not been harassing her nor did she accuse him of harassing her, this is not sufficient to show that the employing establishment acted abusively in initiating the investigation. Prior to the incident which started the investigation, the mailing of an envelope with a key to his personal post office box addressed to Ms. Jagels at her work site, appellant had been told by Ms. Jagels to stop net sending⁷ her at work. As appellant had been advised to stop net sending Ms. Jagels at work, her supervisor did not act abusively in initiating the sexual harassment investigation upon her receipt of the envelope from appellant to Ms. Jagels at her work site. Appellant has provided insufficient evidence to support his allegations that the employing establishment erred or acted abusively in any of the named administrative actions and has not established a compensable factor under the Federal Employees' Compensation Act with respect to these administrative matters.

Appellant has also alleged harassment and retaliation by his supervisor, Mr. Sparks, contributed to his claimed stress-related condition. Appellant contends Mr. Sparks initiated the sexual harassment investigation against appellant in retaliation for appellant spreading gossip about Mr. Sparks and his alleged affair with a coworker. For harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.⁸ Mere perceptions alone of harassment are not compensable under the Act.⁹

An employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which supervisors exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his duties and that employees will at times dislike actions taken. For

⁴ *Ray E. Shotwell, Jr.*, 51 ECAB 656 (2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ *Parley A. Clement*, 48 ECAB 302 (1997); *Jimmy B. Copeland*, 43 ECAB 339 (1991).

⁶ *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁷ Net sending is the employing establishment's internal email system.

⁸ *Frederick D. Richardson*, 45 ECAB 454 (1994).

⁹ See *Mary L. Brooks*, 46 ECAB 266 (1994).

example, the Board has held that discussions of job performance do not fall under coverage of the Act absent a showing of error or abuse.¹⁰ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹¹ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹²

Appellant submitted a witness statement from Stephanie Moore, a coworker, who stated that she believed Mr. Sparks retaliated against [appellant] for spreading rumors about Mr. Sparks by informing Mr. Jaudegis about appellant net sending Ms. Jagels. She also stated that Mr. Sparks inquired who appellant was net sending and that she believed Mr. Sparks was aware of appellant's affair with Ms. Jagels. The Board notes that monitoring employees at work is a function of a supervisor and absent any evidence that the action was unreasonable it is not a compensable factor of employment. Appellant submitted no evidence showing that Mr. Sparks requesting information on whom appellant was net sending was an abuse of discretion or was unreasonable. As appellant has submitted no evidence of error or abuse that Mr. Sparks acted unreasonably or abusively in finding out that the person he was net sending or informing Ms. Jagels' supervisor of that fact. Thus, this is also not a compensable factor of employment.

The Office found that appellant substantiated a compensable factor of employment regarding his work duties and his daily workload. The Board has held that overwork may be a compensable factor of employment.¹³ In the case at hand, appellant submitted a copy of his position description and a February 5, 2001 desk audit finding in support of his allegation that his efforts to cope with his workload caused his emotional condition. The February 5, 2001 desk audit found appellant had "5 folders needing immediate action" and "4 were at least 40 days old" on denial of medicals. The desk audit also made recommendations to appellant to assist him to better control his caseload and interviews with claimants. In addition there is no evidence from the employing establishment showing that appellant was not overworked. Accordingly, appellant has identified a compensable factor of employment regarding his workload. Because appellant substantiated a compensable factor of employment, the Board will examine the medical evidence to determine whether it establishes that this factor contributed to his emotional condition.¹⁴

Although appellant has established a factor of employment with regards to being overworked, which may give rise to a compensable disability under the Act, his burden of proof

¹⁰ *Donald E. Ewals*, 45 ECAB 111 (1993).

¹¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹² *Barbara J. Nicholson*, 45 ECAB 803 (1994).

¹³ *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996); *William P. George*, 43 ECAB 1159 (1992); *Georgie A. Kennedy*, 35 ECAB 1151 (1984).

¹⁴ Appellant's 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 factors. *William P. George*, 43 ECAB 1159 (1992).

is not discharged. 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.¹⁵

In this case, there is no medical report which specifically relates appellant's emotional condition to the accepted employment factors, which included appellant's work duties and overwork. Both of Drs. Trobaugh and Forsyth attributed appellant's condition to the investigation initiated by the employing establishment, which is not accepted as a compensable factor. Therefore, these reports do not discharge appellant's burden. Moreover, Dr. Kory, concluded that appellant's condition was unrelated to his employment. There is no other medical evidence of record addressing a causal relationship between appellant's emotional condition and compensable factors of his employment.

Inasmuch as there is no rationalized medical evidence establishing that appellant's emotional condition was causally related to the accepted compensable employment factors, the work duties and overwork, appellant has failed to discharge his burden of proof.

The October 30 and August 26, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
November 13, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ *Id.*