

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT P. CHAMBERLAIN and DEPARTMENT OF THE NAVY,
FLEET INDUSTRIAL SUPPLY CENTER, Oakland, CA

*Docket No. 01-1494; Submitted on the Record;
Issued October 23, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

On May 4, 1997 appellant, then a 47-year-old firefighter, sustained a lower back injury in the performance of duty. The Office accepted the claim for lumbosacral strain, permanent aggravation of underlying degenerative disc disease and consequential depression and pain disorder. Appellant has not returned to work since that time. The Office paid him appropriate compensation for temporary total disability.

Appellant subsequently filed a claim for an emotional condition,¹ contending that on August 8, 1997 he was subjected to violent, threatening verbal abuse and ridicule from his supervisor, Fire Chief Frank Tallerico. In a handwritten statement dated August 8, 1997 and received by the Office on October 7, 1997 appellant indicated that he learned while he was at home on disability that there had been a delay in processing the paperwork relating to his accepted back injury and that the employing establishment had placed him on indefinite sick leave. He telephoned the employing establishment on August 8, 1997 with the intention of having management process his paperwork so that he could be removed from sick leave and commence receiving the total disability compensation from the Office that was due him. Appellant alleged that when he called Chief Tallerico and asked him to fill out the necessary paperwork he became embroiled in an argument regarding the speed, with which his claim was being processed. He further alleged that Chief Tallerico was retaliating against him because he believed he was fabricating his back injury.

¹ Appellant did not complete the Form CA-2, claim for compensation based on an occupational disease. He submitted a Form CA-1, which the Office processed as one based on occupational disease.

Appellant further alleged that he called Chief Tallerico and asked him to fill out a Form CA-7 so he could receive disability compensation from the Department of Labor (DOL) and have his sick leave reinstated. Appellant stated that Chief Tallerico then replied, "Listen, Bobby, I [a]m not going to play any more ---ing games with you." Appellant then contacted people in the personnel office, including Margaret Weber, the employing establishment's personnel manager and was told that Chief Tallerico was the appropriate employing establishment official responsible for completing the necessary paperwork. Appellant alleged that Ms. Weber told him that she agreed that Chief Tallerico failed to do the necessary paperwork pertaining to his work-related back injury and that because of this he was going to have to buy back his sick leave. Appellant stated that this situation caused him to become frustrated and emotionally stressed and to have emotional breakdowns.

In an affidavit dated August 9, 1997, Stanley Garcia, appellant's union representative, stated that on August 8, 1997 he observed Chief Tallerico tell the person to whom he was speaking on the telephone that he was "not going to play anymore of your ---ing games" and to "do whatever you have to do." Mr. Garcia stated that shortly thereafter Chief Tallerico approached him and asked him whether the union had any involvement with appellant. When Mr. Garcia replied that appellant was not a union member, Chief Tallerico allegedly stated, "good, I [a]m going to get that son-of-a-bitch."

In a report dated September 15, 1997, Dr. Daniel J. Volk, an attending clinical psychologist, stated that appellant felt anxious, frustrated and angry in the months following his back injury. Appellant also experienced difficulty sleeping due to difficulty in managing his back pain, intermittent nausea, headaches and weight loss. Further, in addition to his frustration regarding his medical treatment, appellant began to feel stressed by his supervisor's reaction to disability. Dr. Volk stated that, following the August 8, 1997 incident with Chief Tallerico, appellant began experiencing intense anxiety and felt overwhelmed and dysfunctional. Dr. Volk diagnosed adjustment disorder with mixed anxiety and depression, caused by his difficulty coping with a series of work-related stressors.

In an October 2, 1997 memorandum, Chief Tallerico stated:

"I received a [tele]phone call from [appellant] concerning workers['] [compensation] forms that needed to be processed and that DOL was questioning him why [his] doctor had placed him [on] light duty. Appellant became irate and threatened to take action against me because he was being questioned by DOL [as to] why he had not returned for light duty. I recall him saying I had authorized him to change doctors because the one from Kaiser stated that he could return to light duty and that he was going to another doctor that would agree with him that he could not perform light duty. I reminded him that I had offered him a light[-]duty assignment and that he had refused stating that his back bothered him so much that he could not drive for more than 15 [minutes] and that he could not sit still for any length of time. In addition, [he said] that I could not authorize him to change doctors[,] that only DOL could. At no time did I initiate any profane language at [appellant] during subject [tele]phone call."

In a handwritten statement dated October 7, 1997, Ronald Fritz, a coworker of appellant, asserted that on August 8, 1997 he was visiting with Chief Tallerico in his office when he received a telephone call. Mr. Fritz stated that he overheard Chief Tallerico tell the person to whom he was speaking to do whatever he had to do.

By decision dated November 18, 1997, the Office found that fact of injury was not established, as the evidence of record did not establish that an emotional condition was sustained in the performance of duty.

Appellant requested reconsideration of the November 18, 1997, Office decision and submitted additional evidence. In a statement dated December 18, 1997, Chief Tallerico asserted that after the August 1997 episode he informed Mr. Garcia that appellant had threatened to make trouble for him regarding his workers' compensation claim. However, Chief Tallerico denied using profane language or making threats toward appellant during this conversation. In a statement dated December 18, 1997, Mr. Fritz asserted that he did not recall Chief Tallerico using profanity or raising his voice to appellant during the August 8, 1997 telephone conversation. By letter dated December 18, 1997, Ms. Weber acknowledged that there were delays in the submission of appropriate forms in processing appellant's workers' compensation claim for his accepted low back injury, though she asserted that these delays were not deliberate.

Dr. Lawrence I. Sirott, a Board-certified family practitioner and appellant's treating physician, submitted a report, which was received by the Office on December 18, 1997. Dr. Sirott stated that he had been treating appellant for his back injury since June 1997 and had referred him to a psychologist, Dr. Volk, because of the significant emotional problems, which were directly associated with his back injury and with his problems negotiating his claim with the employing establishment. Dr. Sirott opined that appellant's recovery from his accepted back injury had been made more difficult by the interplay between anxiety and the physical pain he was experiencing. He indicated that appellant had limitations of lifting, bending, sitting, pulling, squatting and etc.

In a report dated January 29, 1998, Dr. Volk reiterated that appellant's stress originated from the high volume of paperwork, telephone contacts and meetings required by his job. Dr. Volk stated that appellant experienced additional stress due to daily tension regarding whether "promised checks and remedies" would arrive in the mail.

By decision dated February 27, 1998, the Office denied modification of the November 18, 1997 decision. By letter dated March 10, 1998, appellant requested an oral hearing. By decision dated March 11, 1998, the Office issued an amended compensation order denying the claim for an emotional condition. The Office, however, set aside the February 27, 1998 decision denying appellant the right to a hearing. A hearing was subsequently scheduled for June 21, 2000.

In a report dated July 20, 1999, Dr. Volk again reiterated that appellant was experiencing a great deal of stress due to "pay issues" and the role Chief Tallerico allegedly played in delaying and threatening to interfere with his pay. He noted that appellant had failed to receive a check he was due to receive in the first week of September 1997 and was informed by the Office in a December 11, 1997 letter that his paychecks had been terminated. Dr. Volk stated that the

termination of his paychecks exacerbated appellant's emotional condition and intensified his feeling that management was acting in a hostile, demeaning and retaliatory manner toward him. He noted that appellant's emotional state improved markedly when his paychecks were reinitiated in February 1998.

Appellant testified at the hearing that he has been on temporary total disability since August 1997, when he injured his back. Appellant stated that he wrote two memorandums to Chief Tallerico in June 1997, reminding him that he was on indefinite temporary total disability and was unable to even do light duty. Appellant then claimed that he discovered that the employing establishment had been using his sick leave without his knowledge to cover his days off from work, at which time he telephoned Ms. Weber. When she told him that Chief Tallerico was holding up his paperwork, he called Chief Tallerico on August 8, 2000 and asked him to fill out a Form CA-7 so that he could get paid by DOL for his accepted claim and have his sick leave restored. It was during this telephone call that Chief Tallerico allegedly told him "listen here, [appellant] I [a]m not going to play anymore of your ---ing games" Appellant claimed that this exchange with Chief Tallerico caused him severe emotional stress. He further alleged that another supervisor, Roger Core, created a hostile work environment by telling him to shut up, subjecting him to verbal abuse and permitting name-calling in the workplace.

Union president Mr. Garcia also testified at the hearing. He stated that he got the impression that Chief Tallerico and other employing establishment officials believed appellant was faking his back injury and were trying to get him fired. Mr. Garcia also indicated that he got the distinct impression Chief Tallerico was not going to pursue his administrative responsibilities with regard to appellant's workers' compensation claim. He explained that the base was closing, so Chief Tallerico did not really seem to care about discharging his administrative responsibilities and had a strained relationship with appellant. In addition, Mr. Garcia stated that he heard Chief Tallerico specifically tell appellant "I [a]m not going to play anymore of your ---ing games." Mr. Garcia asserted that Chief Tallerico and some of the other supervisors, including Mr. Core, disliked appellant and were working together to try to sabotage his claim. He stated that Mr. Fritz wrote his statement because he wanted to obtain a job.

In a June 3, 1998 affidavit, Ms. Weber, the employing establishment's personnel management specialist who handled appellant's workers' compensation paperwork, stated that appellant spoke to her following his August 8, 1998 confrontation with Chief Tallerico. She stated that he seemed upset because Chief Tallerico had called him "Bobby" and told her of his version of events. Ms. Weber further stated:

"There were administrative delays in processing [appellant's] paperwork for his back injury claim. I do n[o]t recall what the exact cause of the delay was in processing [appellant's] paperwork for his back injury. It certainly was n[o]t purposeful. All I can attribute it to is a large workload. I have been a one-person office since September of 1996 and have had to handle all of the HRO issues for this base single-handedly. [Appellant's] age and the fact that he was injured certainly had nothing to do with the delay.

By decision dated September 11, 2000, an Office hearing representative affirmed the November 19, 1997 Office decision denying benefits for an emotional condition. The hearing

representative found that the evidence regarding the August 8, 1997 telephone conversation between appellant and Chief Tallerico was contradictory and did not establish harassment, error or abuse on the part of the employing establishment. The hearing representative, therefore, found that this incident was not compensable. The hearing representative found that appellant's emotional reaction to his May 1997 accepted back injury, in relation to his chronic pain and physical limitations, was a compensable factor of employment. However, the hearing representative stated that the medical evidence of record did not contain a probative, rationalized opinion sufficient to establish that this factor caused or contributed to appellant's emotional condition.

By letter dated January 17, 2001, appellant's representative requested reconsideration. Accompanying the letter was a December 13, 2000 letter from the Equal Employment Opportunity Commission (EEOC), which acknowledged receipt of appellant's appeal from an EEOC decision.

By decision dated January 22, 2001, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

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

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.² There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.³

The first issue to be addressed is whether appellant has cited factors of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁴ On the other hand disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁵

² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Id.*

The Board finds that appellant has failed to submit sufficient evidence to establish his allegations that his supervisors engaged in a pattern of harassment. Appellant has alleged, in general terms, harassment from Chief Tallerico and Mr. Core, but has not provided a description of specific incidents or sufficient supporting evidence to substantiate the allegations.⁶ Appellant has not submitted any factual evidence to support his allegations that he was harassed, mistreated, or treated in a discriminatory manner by his supervisors. To that end, appellant failed to establish that his supervisors threatened or verbally abused appellant or otherwise ridiculed him during the periods and dates he alleged these episodes occurred. The Office properly found that the allegations made by appellant concerning the alleged conspiracy between Chief Tallerico and Mr. Core, to sabotage his workers' compensation claim were not established as factual by the weight of evidence of record. Further, while appellant may have engaged in a heated telephone conversation with Chief Tallerico on August 8, 1997 regarding management's delay in processing his claim, during which Chief Tallerico may have used inappropriate language appellant has failed to demonstrate that Chief Tallerico's conduct during this conversation constituted a compensable employment factor. The record contains conflicting accounts regarding what was actually said during this conversation. Mr. Garcia, the union representative, stated that he observed Chief Tallerico telling the person to whom he was speaking on the telephone that he was "not going to play anymore of your ---ing games" and to "do whatever you have to do."⁷ Mr. Garcia stated shortly thereafter Chief Tallerico approached him and asked him whether the union had any involvement with appellant. When Mr. Garcia replied that appellant was not a union member, Chief Tallerico allegedly stated: "good, I [a]m going to get that son-of-a-bitch." However, coworker Mr. Fritz submitted two statements pertaining to the August 8, 1997 telephone conversation, one dated October 7, 1997 and one dated December 18, 1997. Mr. Fritz also stated that he overheard Chief Tallerico tell the person to whom he was speaking to do whatever he had to do, but asserted that he did not recall Chief Tallerico using profanity or raising his voice during this conversation. Given that there are contradictory accounts from witnesses regarding what Chief Tallerico actually said during the August 8, 1997 conversation and in the absence of additional context, it is unclear whether such isolated comments would constitute harassment. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.⁸ Appellant has not shown how such isolated comments would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.⁹

⁶ See *Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

⁷ The record also contains an August 8, 1997 statement from appellant's daughter, in which she alleges she overheard a conversation her father was having with Chief Tallerico, in which he told him "[l]isten here, [appellant], I [a]m not going to play any more of your ---ing games anymore."

⁸ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

⁹ See, e.g., *Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). Compare *Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

The Office reviewed all of appellant's specific allegations of harassment, abuse and mistreatment and found that they were not substantiated or corroborated. To that end, the Board finds that the Office properly found that the episodes of harassment cited by appellant did not factually occur as alleged by appellant, as he failed to provide any corroborating evidence for his allegations. Nor has appellant provided factual support for his allegations that his supervisors created a hostile work environment.¹⁰ As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work, which do not support his claim for an emotional disability.¹¹ For this reason, the Office properly determined that these incidents constituted mere perceptions of appellant and were not factually established.

The Board further finds that the administrative and personnel actions taken by management in this case contained no evidence of agency error and are, therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.¹² In the instant case, appellant has presented no evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters. Appellant has failed to submit sufficient evidence to establish his allegations that the employing establishment deliberately delayed processing the paperwork pertaining to his accepted claim. Nor has appellant demonstrated that the employing establishment acted unreasonably or committed error or abuse in discharging its administrative duties with regard to this incident. Thus, these actions on the part of management did not constitute a factor of employment.¹³

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.¹⁴ However, error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.¹⁵ In the present case, there is no evidence of record to substantiate appellant's allegations that the employing establishment acted unreasonably in using sick leave to cover his

¹⁰ *Merriett J. Kauffmann*, 45 ECAB 696 (1994).

¹¹ *See Debbie J. Hobbs*, *supra* note 2.

¹² *See Alfred Arts*, *supra* note 9.

¹³ The hearing representative properly found that the administrative and personnel actions taken by management in this case contained no evidence of agency error and are, therefore, not considered factors of employment. Regarding appellant's allegation that he developed stress due to the uncertainty of his job duties and his insecurity about maintaining his position, the Board has previously held that a claim's job insecurity is not compensable factor employment under the Act. Accordingly, a reaction to such factors did not constitute an injury arising within the performance of duty. The Office properly concluded that in the absence of agency error such personnel matters were not compensable factors of employment. *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

¹⁴ *Elizabeth Pinero*, 46 ECAB 123 (1994).

¹⁵ *Margreate Lublin*, 44 ECAB 945 (1993).

days off from work while processing his disability claim. As indicated earlier, there is no evidence that management deliberately delayed processing his claim. Moreover, the employing establishment was required to submit some other form of documentation to account for appellant's absence during that period, until such time as his entitlement to total disability was formally authorized.¹⁶ Appellant thus has produced no evidence that Chief Tallerico or any other management official acted unreasonably or committed error in discharging his administrative duties during this incident. Accordingly, a reaction to such factors did not constitute an injury arising within the performance of duty. The Office properly concluded that in the absence of agency error such personnel matters were not compensable factors of employment.

Although the Office found that appellant established a compensable factor of employment; *i.e.*, his reaction to the chronic pain and physical limitations stemming from his May 4, 1997 lower back injury,¹⁷ the Board finds that the medical evidence of record is not sufficient to establish that this caused or contributed to his emotional condition. Dr. Volk stated in his September 15, 1997 report that, although appellant had been able to manage his stress level prior to the August 8, 1997 incident, he subsequently became overtly symptomatic and sought treatment from his physician. Dr. Volk further stated that appellant appeared to have experienced consistent success and adaptability in the workplace prior to the May 4, 1997 injury and the August 8, 1997 incident with Chief Tallerico. He advised that the May 1997 back injury and the experience of prolonged pain interfered with basic functions such as sleep and contributed to appellant's susceptibility to subsequent stress. Dr. Volk stated, however, that it was not until after the period of growing stress over disability paperwork and the August 8, 1997 incident that appellant became acutely symptomatic and required a referral for psychological treatment. In addition, Dr. Volk noted in his subsequent January 29, 1998 and July 20, 1999 reports that much of the stress appellant experienced stemmed from the large amount of paperwork, telephone contacts and meetings required by his job, in addition to the fact that he was extremely concerned about receiving paychecks in the mail. Dr. Volk's reports indicate, therefore, that appellant's emotional problems stemmed primarily from the August 8, 1997 argument with his supervisor, which has been found not to be compensable; from being overworked, which was not found to be compensable; and from nonwork-related problems such as the delayed processing of his workers' compensation claim. Thus, Dr. Volk did not provide a rationalized medical opinion, based on a proper factual and medical background, explaining his opinion on causal relationship or otherwise relating his diagnosis to the factor found compensable in this case the May 1997 back injury. As appellant has not submitted medical evidence sufficient to demonstrate that his accepted employment factor caused or contributed to his emotional condition, the Board finds that he has failed to meet his burden of establishing that he sustained an emotional condition in the performance of duty.¹⁸

¹⁶ *Drew A. Weismuller*, 43 ECAB 745 (1992); *Kathi A. Scarnato*, 43 ECAB 220 (1991).

¹⁷ *See Charles J. Jenkins*, 40 ECAB 362 (1988).

¹⁸ The record also contains a line of decisions dated June 8, 2001 and August 3, 2000, which pertain to a claim for an emotional condition based on appellant's exposure to waste material at work. Appellant has not appealed these decisions to the Board.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.¹⁹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁰

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted was either previously considered and rejected by the Office in prior decisions, or is not pertinent to the issue on appeal. The only evidence appellant submitted, the letter from the EEOC, constitutes a receipt of an appeal of an administrative decision made by another government agency and contains no new evidence purporting to establish another compensable work factor. It is, therefore, not pertinent to the issue on appeal; *i.e.*, whether appellant sustained an emotional condition in the performance of duty. Further, appellant did not submit any additional medical evidence with his request for reconsideration demonstrating that the employment factor found compensable in this case caused or contributed to her emotional condition. Thus, he failed to submit evidence sufficient to warrant reopening the case for a merit review. Additionally, the January 17, 2001 letter from appellant's representative, failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits. The Board, therefore, affirms the Office's January 22, 2001 decision.

¹⁹ 20 C.F.R. § 10.606(b)(1). *See generally* 5 U.S.C. § 8128(a).

²⁰ *Howard A. Williams*, 45 ECAB 853 (1994).

The decisions of the Office of Workers' Compensation Programs dated January 22, 2001 and September 11, 2000 are hereby affirmed.

Dated, Washington, DC
October 23, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member