

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL McKEOWN and DEPARTMENT OF THE NAVY,
NAVAL REGIONAL MEDICAL CENTER, San Diego, CA

*Docket No. 03-971; Submitted on the Record;
Issued October 3, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On May 31, 2002 appellant, then a 55-year-old clinical psychologist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an emotional condition due to various incidents and conditions at work that occurred subsequent to December 13, 2000 when he was assaulted by a patient in the performance of duty.¹ In support

¹ The Office of Workers' Compensation Programs accepted that appellant sustained employment-related post-traumatic stress disorder (PTSD) and contusions and facial abrasions related to this traumatic injury/assault under file number 13-2052919. Appellant returned to his regular duties following the assault. The Office noted that it did not address the issues related to the December 13, 2000 traumatic injury under the instant occupational disease claim, adjudicated by the Office under file number 13-2057986. Appellant has an additional appeal pending before the Board in regard to file number 13-2052919, Docket No. 03-974.

of his claim, appellant submitted medical and factual evidence.² In his statement, appellant alleged numerous issues which he believed contributed to his condition subsequent to the December 13, 2000 assault. He indicated that, after the assault, he became “hypervigilant” and took numerous measures to protect himself at home and work in order to prevent a future assault. At work, he purchased a boat horn in an aerosol can. Appellant also stated that he began to leave his office door open so that he could call for help, but was informed to stop as it violated patient confidentiality. He also indicated that he requested an alarm system, and was informed that one would be installed but nothing happened. Appellant alleged that he filed a safety complaint thereafter and soon after, he could not “do anything right” for his supervisors. He alleged that he was denied a bonus,³ informed that his performance was substandard, and that he would be placed on a performance improvement plan (PIP). Appellant indicated that he inquired regarding his privileging requirement that he be proctored and his supervisor dismissed that request.⁴ Further, he alleged that his anxiety and depression worsened because his supervisors were not accommodating him with regard to aggressive patients and were out to destroy him. Appellant stated that, after his privileges were revoked, his patient’s appointments were cancelled without being informed or provided the opportunity for a proper ethical termination. He alleged that he felt assaulted by the actions of his supervisors who had falsely labeled him as “impaired and even lacking judgment” to the point that he was a danger to patients. Appellant alleged that he was falsely removed from his position and the recommendation to suspend his privileges ruined his career and rendered him vulnerable and destroyed.

In an email dated May 9, 2002, Captain Bailey informed appellant that his office door had to be closed while appellant was interviewing patients to ensure privacy. He further

² The evidence was comprised of a statement; numerous letters of reference; leave slips; a position description; a December 3, 2001 letter from his attorney regarding his filing of a safety complaint and a copy of the May 29, 2001 complaint; documentation regarding his suspension, reassignment and the Naval Peer Review Panel decision dated April 2002 revoking his clinical privileges; statements regarding allegations of safety violations and a January 4, 2002 Safety Complaint Appeal from the Commander of the San Diego Naval Medical Center. He also included: chart notes, disability certificates, diagnostic studies and form reports reporting the condition of depression and PTSD; a report dated August 2, 2002 from Dr. Geoffrey Sternlieb, a Board-certified psychiatrist, indicating that that appellant had anxiety disorder developing from the December 13, 2000 assault and psychosocial stressors such as occupational and financial stressors; an August 27, 2001 report from Dr. Bruce Hubbard, a psychiatrist, indicating appellant had brain injury, generalized anxiety disorder and PTSD; and a report dated May 20, 2002 from Dr. Joseph S. Andrews, Board-certified in internal medicine, containing a diagnosis of PTSD related to the recent loss of appellant’s position. The record also contained a January 15, 2002 neurological psychological evaluation from Thomas Wegman, a PhD., reporting the condition of PTSD, with a history of a physical assault on December 13, 2000 and recent administrative actions by his employer regarding “accusations of job performance and incompetence and threat of possible job loss.” The record also contains disability reports from Curtis Rouanzoin, a PhD., reporting an “exacerbation of his symptoms” with a work history of an assault and privileges to practice being revoked by the Navy Peer Review Panel.

³ Appellant provided a copy of an email indicating that he was not eligible for the \$1,000.00 bonus due to substandard performance dated June 1, 2001.

⁴ He provided a June 19, 2001 letter to Dr. Stanley Raczek inquiring into how his performance was “substandard.” In a subsequent email dated June 29, 2001 to Robyn Vescoe and commander Stanley Raczek, Captain Michael Bailey, a Board-certified psychiatrist and clinician manager, indicated that he would like to proceed with a PIP rather than a dismissal/removal.

informed appellant that nonapproved questionnaires were not to be used and requested that appellant remove the phrase, “supervised by S. Raczek and M. Bailey” as he was an independent provider as opposed to a “trainee.” Appellant enclosed a copy of his response, including a request to reconsider the door issue and follow up on an alarm system, as he deemed it a safety concern. He also responded to the request regarding supervision.

In an August 6, 2002 letter, the Office advised appellant of the evidence needed to establish his claim and requested that he submit such.⁵ By letter of the same date, the Office advised the employing establishment to submit factual evidence regarding appellant’s claim.

In a September 10, 2002 statement, Captain Bailey reported that appellant had been assaulted by a patient on December 13, 2000 and the beating resulted in numerous injuries and could have been severe enough to produce a PTSD. Captain Bailey opined that appellant’s inability to perform his duties was not related to the PTSD, advising that appellant had exhibited difficulties that required additional training and supervision. Prior to the assault, Captain Bailey advised that the quality of appellant’s work remained poor because he lacked the overall competency to perform the duties of a clinical psychologist with independent privileges and when it became clear that remedial efforts were not effective and that he was endangering patients, his privileges were held in abeyance on August 9, 2001. He noted that the peer review report on appellant showed no discernible difference before or after the assault. Captain Bailey reported that a neuropsychological evaluation had been performed by Dr. Wegman who found no evidence of organic cerebral impairment and that appellant had “pronounced perfectionistic and obsessive features which were not only easily evident in casual conversational interaction, but were also repeatedly reflected in his test performance.” He noted that the commanding officer was unsure of how much of appellant’s dysfunction was due to the assault and/or PTSD and subsequently agreed to restore appellant’s privileges. Dr. Wegman proposed placing appellant on a PIP as appellant had been out of clinical care for an extended period; appellant, however, chose not to renew his clinical privileges and remained on extended sick leave.

The record also contained the September 5, 2001 notice that appellant’s clinical privileges were suspended,⁶ a copy of the April 15, 2002 decision resulting from the Peer Panel

⁵ The Office advised appellant that his traumatic injury claim No. 13-2052919 had been accepted for a PTSD related to the physical assault he sustained while in the performance of duty on December 13, 2000. The Office advised appellant that, since he had returned to full duty following the December 13, 2000 incident, they would address ongoing work factors in the instant claim.

⁶ The Office received additional evidence including: a performance appraisal for the period of November 1996 through September 1997, citing the need for “improvement of performance within the military context”; an official notification to appellant dated August 9, 2001 notifying him of the removal of his clinical privileges held at the Naval Medical Center in San Diego Mental Health Department, advising him that his privileges were “in abeyance”; and a Notice of Clinical Privileges Summary Suspension dated September 5, 2001.

hearing, which was held on January 22, 2002,⁷ a copy of a June 4, 2002 decision in which the commanding officer of the employing establishment found that, based on his review of the peer review hearing and the investigation regarding the clinical competence of appellant, he concurred with the findings of the peer review panel. However, as he was uncertain as to how much the assault affected appellant, he restored appellant to full clinical psychology privileges and placed him on a PIP for reentry into clinical psychology at the employing establishment.

On July 28, 2002 appellant informed the employing establishment that he would not be reapplying for his clinical privileges because his doctor had placed him on permanent total disability. By letter dated August 12, 2002, the employing establishment terminated appellant's clinical privileges.

In a November 7, 2002 decision, the Office denied the claim because performance of duty was not established.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁸

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁹ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.¹⁰ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.¹¹ When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when

⁷ The decision recommended that Dr. McKeown's privileges be revoked due to "significant deficiencies in the care he was providing to patients, recommending extensive retraining in basic areas." The peer panel decision also indicated that appellant's failure to document and track patient's progress existed prior to the assault in December 2000.

⁸ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁹ 28 ECAB 125 (1976).

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.¹²

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.¹³ 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.¹⁴

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 the physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹⁵ If appellant 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁶

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated November 7, 2002, the Office denied appellant's emotional condition claim related to work factors separate from his December 13, 2000 traumatic injury claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Administrative or personnel matters, although generally related to employment, are administrative functions of the employer rather than regular or specially assigned work duties of the employee.¹⁷ Where disability results from an employee's emotional reaction to certain administrative or personnel matters unrelated to the employee's regular or specially assigned work duties, the disability does not fall within coverage of the Act.¹⁸ However, an administrative or personnel matter will be considered an employment factor where the evidence

¹² *Lillian Cutler*, *supra* note 9.

¹³ *Pamela R. Rice*, 38 ECAB 838, 841(1987).

¹⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹⁵ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁶ *Id.*

¹⁷ *Gregory N. Waite*, 46 ECAB 662 (1995).

¹⁸ *Michael L. Malone*, 46 ECAB 957 (1995).

discloses error or abuse on the part of the employing establishment.¹⁹ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁰

Appellant alleged that the employing establishment violated or ignored safety violations. However, the employing establishment indicated that they were implementing appellant's idea of issuing each individual a fog horn that could be transported with them and used in an emergency and they were investigating implementing an alarm system. Appellant also alleged that he wanted his door kept open. The employing establishment, however, explained that the doors needed to be closed due to privacy constraints and indicated that appellant could request assistance with those patients he might deem necessary. Appellant has not provided any supporting evidence to establish that the employing establishment ignored safety violations as claimed and the Board finds that the employing establishment acted reasonably in this regard.

Appellant also alleged that he was falsely removed from his position in May 2001 due to an inadequate job performance with no prior notification. The employing establishment, however, advised that appellant was removed from his clinical duties due to deficiencies in his work, which had been identified prior to the December 13, 2000 assault. Furthermore, although appellant's clinical privileges were removed, full privileges were restored. Appellant then notified the employing establishment that he was not going to renew his privileges. The Board finds that the evidence of record does not establish that the employing establishment acted unreasonably in this regard, and the fact that his privileges were subsequently restored does not establish error or abuse.²¹ Likewise, the decision of the employing establishment to place appellant on a PIP was not unreasonable.

Appellant also indicated that he was denied a bonus. The Board has long held that assessment of work performance is an administrative function of the employing establishment and absent error or abuse, does not constitute a compensable factor of employment.²² There is no indication in the record that appellant was improperly denied a bonus. He has not established a compensable employment factor under the Act in this respect.

Appellant generally related that his supervisors unfairly criticized his work and were out to destroy him and that he was retaliated against for filing a safety violation. The record in this case indicates that the employing establishment was improving safety and working on implementing an alarm system. Furthermore, there is no evidence contained in the record to indicate that appellant's supervisors acted inappropriately. The Board has held that mere perceptions of harassment or retaliation, in the absence of corroborating evidence, do not

¹⁹ *Elizabeth Pinero*, 46 ECAB 123 (1994).

²⁰ *Ruth S. Johnson*, 46 ECAB 237 (1994).

²¹ *Mary L. Brooks*, 46 ECAB 266 (1994).

²² *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

constitute a compensable factor of employment.²³ Appellant, therefore, did not establish harassment on the part of the employing establishment.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.²⁴

The November 7, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 3, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²³ *Elizabeth Pinero*, *supra* note 19.

²⁴ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).