

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER E. SOBLESKIE, JR. and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, U.S. PENITENTIARY, Lewisburg, PA

*Docket No. 03-1265; Submitted on the Record;
Issued September 5, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained an emotional condition on or before May 14, 2001 in the performance of duty causally related to factors of employment; and (2) whether the Office of Workers' Compensation Programs properly denied his request for an oral hearing.

On May 24, 2001 appellant, then a 43-year-old correctional officer,¹ filed a claim alleging that he sustained anxiety, depression, panic attacks, alcohol dependency, prescription drug dependency and post-traumatic stress disorder (PTSD) in the performance of duty on or before May 14, 2001. He stopped work on May 12, 2001 and did not return. Appellant was placed on administrative leave on or before July 19, 2001.²

In July 17 and August 15, 2001 letters, appellant described the events to which he attributed his conditions: a negative performance review while in training in 1987; denial of a promotion and grade increase; being assigned to the food service in 1987; being threatened by an armed inmate in April 1987 and being criticized for calling for assistance; witnessing a June 1987 sexual assault and being threatened by the assailant, then having his disciplinary measures nullified by the warden; protecting a client of F. Lee Bailey's in 1991, who accused the employing establishment of criminal misconduct; not being recognized for his work; fearing retaliation for making the warden look bad; an inmate murder in 1993 when instructions about segregating the inmate were not followed; that his father was diagnosed with terminal cancer in February 1995; that appellant's request for a hardship transfer was denied; that on June 28, 1995

¹ Appellant submitted a position description for "correctional officer," which provided that daily contact with felons and dangerous inmates and exposure to "arduous, adverse and stressful working conditions and environments," including "hostile or life-threatening situations" was required.

² In a July 13, 2001 letter, V.R. Zimmerman, an employing establishment human resources manager, noted that appellant reported nightmares, blackouts and episodes of confusion. He stated that appellant's "physical/psychiatric condition pose[d] a threat to him and his coworkers in a law enforcement environment."

appellant's mother was severely burned in house fire and died on his birthday; the death of appellant's father on October 10, 1995, after which his grandfather was hospitalized and the employing establishment issued appellant a reprimand for misuse of leave; 1995 prison riots necessitating 12-hour shifts, 6 days per week for many weeks; 1995 harassment by his superiors; receiving a lower pay rate when he returned to his former position in 1995; not being recognized or rewarded for preventing a 1996 murder; the August 16, 1996 murder of Dr. Margaret Bostrom, a staff psychologist and one of appellant's care takers, neighbors and friends, allegedly by her estranged husband; threats against appellant by the estranged husband; a drinking binge and hospitalization following the murder; harassment by coworkers stating that Dr. Bostrom deserved to die.

Appellant continued that on August 28, 1997 he saw a stabbed inmate lying on the floor, then chased and confronted four armed inmates by himself, but did not get an "outstanding" performance evaluation; in December 1999, his superiors wrote obscenities on his work; in February 2000, appellant had severe "right body" pain at work and when transported to the hospital in an ambulance, was accused of abusing leave³; in March 2000, appellant voluntarily resigned as a GS-11 case manager and accepted a GS-8 guard position in a gun tower, but was removed after joking that he could shoot his former clients; appellant was then off work for 12 weeks due to the removal of a benign foot tumor.⁴

On May 12, 2000 a fire destroyed appellant's home, located on the prison reservation, killing three of his four pet cats. He alleged that a fire crew was delayed in responding, as officials refused to provide a map of the reservation, that the hydrants around his house were broken, that the warden swore at him on May 13, 2000, that his coworkers joked about the fire in front of him, that the warden assigned him to live in quarters infested with insects and polluted with raw sewage and that the facilities manager refused to clean or repair the quarters because he was busy preparing for a party. Appellant then moved into an unheated garage, was ordered by Warden Romine to leave it and ordered that appellant's cat be removed, resulting in its escaping and becoming feral. Appellant then filed a civil suit against the employing establishment for negligence and alleged that he was harassed by prison officials in retaliation. In June or July 2000, he found an inmate's corpse in the housing unit; appellant was reprimanded for not following the chain of command in reporting a gas leak in an abandoned house on the prison reservation; prison officials allegedly made obscene telephone calls to his home from November 2000 through July 2001.

In August 10 and September 27, 2001 letters, the Office advised appellant that the medical evidence of record was insufficiently rationalized to establish causal relationship and that he must submit a detailed statement of the alleged work factors.

³ The record contains an April 16, 2000 emergency room report regarding right flank pain, with a diagnosis of musculoskeletal pain.

⁴ The record contains a February 29, 2000 report regarding a right foot nodule.

Appellant submitted medical evidence in support of his claim.⁵ Dr. James Zola, an attending Board-certified internist, submitted periodic reports from July 11, 2000 through March 6, 2001 diagnosing an adjustment disorder with depressed mood, panic disorder and anxiety. A July 11, 2000 report relates appellant's account of the death of his parents, his house fire, Dr. Bostrom's murder and the death of his cats. A November 28, 2000 report noted that appellant experienced "continued stress." In a January 16, 2001 report, Dr. Zola noted that appellant reported "grisly images of supposed attacks of inmates on one another at work ... finding [an] inmate dead in cell two years ago."

Dr. Franz Bauer, an attending Board-certified internist, submitted a February 7, 2001 report relating appellant's account of the death of his parents, the house fire, "pay cuts, work reassignments," "job stressors" and "demotions." He diagnosed an adjustment disorder. In reports through April 17, 2001, Dr. Bauer noted appellant's accounts of hallucinations and schizotypal features and diagnosed depressive and panic disorders.

Dr. R. Scott Hoffer, an attending Board-certified psychiatrist, submitted January 18 and 20, 2001 reports, noting that appellant was referred to the emergency room due to emotional decompensation. He noted that appellant "demoted himself" due to "panic and anxiety" which developed following the death of his parents, relocating and returning to the area where his parents lived, the house fire and death of his cats. Dr. Hoffer diagnosed panic disorder with secondary depression, "life circumstances problem" and "possible unresolved grief." He noted that appellant exhibited referential thinking "related to problems he has had at work due to his worsening dysfunction, although no true psychotic symptoms." Dr. Hoffer held appellant off work through May 2001.⁶

By decision dated September 20, 2001, the Office denied appellant's claim on the grounds that he had not established that he sustained an injury. The Office accepted that he "actually experienced the claimed employment facts," but that the medical evidence was insufficiently rationalized to establish causal relationship. Appellant disagreed with this decision and, in a September 24, 2001 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held March 27, 2002. At the hearing, appellant reiterated his account of events. By decision dated and finalized June 14, 2002, the Office hearing representative affirmed the Office's September 20, 2001 decision. The hearing

⁵ Appellant also submitted notes from R. James Rinck and Harriet Poechmann, both social workers. As these notes were not signed or reviewed by a physician, they do not constitute medical evidence. *Ricky S. Storms*, 52 ECAB 349 (2001). Appellant also submitted medical reports regarding emergency room visits for various medical conditions unrelated to his claim: September 8, 1999 for an infected finger; October 10, 2000 for an infected toe; November 20, 2000 for costochondritis; March 6, 2001 for right knee pain.

⁶ In a June 4, 2001 report, Glenn Jacobson, a licensed psychologist, reported appellant's account of personal losses and "significant stressors ... related to the environment and to interpersonal relationships at the workplace." Mr. Jacobson diagnosed PTSD and possible acute stress disorder. The record indicates that Mr. Jacobson is a licensed psychologist in the State of Pennsylvania. However, the record is not explicitly clear as to whether Mr. Jacobson is considered a licensed clinical psychologist, thereby qualifying him as a physician for the purposes of this cause under section 8101(2) of the Act. This distinction is moot, however, as Mr. Jacobson did not provide medical rationale addressing causal relationship, the critical issue in this case. Therefore, his opinion is of little or no probative value in establishing causal relationship in this case, whether it is considered as medical evidence or not. *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

representative found that appellant had established, as compensable, that, as a case manager and corrections officer, he performed daily counseling and had daily contact with rapists, murderers and other felons and that, in September 1997, appellant saw an inmate stabbed and bleeding and chased the four armed assailants throughout the prison. The hearing representative further found that appellant had established as factual but noncompensable that his house burned down. The hearing representative also found that appellant's demotion from case manager to corrections officer was a noncompensable, administrative matter and that no error or abuse was shown. Regarding appellant's allegations of harassment, obscene telephone calls and disciplinary charges, the hearing representative found that appellant submitted insufficient evidence to corroborate these events. The hearing representative noted that appellant's personal tragedies, including the death of his parents, the murder of Dr. Bostrom, the destruction of his house and the death of his pet cats, were unrelated to appellant's federal duties and, therefore, not compensable under the Federal Employees' Compensation Act.⁷

In an August 19, 2002 letter, appellant requested a "reconsideration hearing" regarding the Office's June 14, 2002 decision,⁸ asserting that the Social Security Administration approved his application for disability benefits.⁹ He submitted new evidence. In a March 28, 2002 report, Dr. Zola stated that the "significant stress related to [appellant's] job, as well [as] his recent house fire ... contributed significantly to [appellant's] anxiety and depression and his current disability...." In a September 23, 2002 report, Dr. Doug Contri, a licensed clinical psychologist, related appellant's belief that his psychiatric conditions were due to "an accumulation of stress" from Dr. Bostrom's murder in 1996, the double homicide at the employing establishment in 1997, the house fire, "a perception that ... [appellant] was not provided adequate psychosocial support" by his superiors, "the discovery of a dead inmate in the housing unit" and a "change in [appellant's] position and work hours."

By decision dated November 15, 2002, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant such modification. The Office found that appellant submitted insufficient medical evidence to establish that he sustained a psychiatric condition due to the accepted work factors of working with inmates, as a case manager, and witnessing an inmate bleeding after a 1997 stabbing. The Office explained that Dr. Contri's September 23, 2002 report and Dr. Zola's March 28, 2002 report merely related appellant's account of events.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ The Office interpreted and developed appellant's request for a "reconsideration hearing" as a request for reconsideration of his case on the merits.

⁹ Determinations of other administrative agencies, such as the Social Security Administration, are not binding on the Office or the Board with respect to whether the individual is disabled under the Act. *James E. Norris*, 52 ECAB 93 (2000).

In March 5, 2003 letters, appellant alleged that the Office hearing representative omitted testimony from the transcript concerning harassment by employing establishment officials after he reported a natural gas leak. He submitted a January 2, 2003 report by Dr. Contri¹⁰ and a January 31, 2003 report by Dr. Carl Middleton, an attending clinical psychologist,¹¹ and requested an oral hearing to consider the new evidence. By decision dated March 28, 2003, the Office denied appellant's March 5, 2003 request for an oral hearing on the grounds that he had already requested and received reconsideration under section 8128(a) of the Act. The Office then conducted a limited review of the evidence submitted and further denied appellant's request on the grounds that the issues involved could be advanced equally well through the submission of new, relevant evidence accompanying a request for reconsideration.¹² Appellant filed his appeal with the Board on April 16, 2003.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty causally related to factors of employment as alleged.

To establish an emotional condition causally related to factors of his or her federal employment, a claimant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.¹³

When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act. On the other hand, where the disability results from an employee's

¹⁰ In a January 2, 2003 report, Dr. Contri explained that the "proximal cause" of appellant's problems" from May 1998 to April 2002 was "an accumulation of stress" due to Dr. Bostrom's murder, the August 1997 double homicide, "the destruction of [appellant's] home by fire," a perception of inadequate support, "the discovery of a dead inmate in the housing unit; and a change in [appellant's] position and work hours."

¹¹ In a January 31, 2003 report, Dr. Carl Middleton, an attending clinical psychologist, noted being on staff with appellant from April 1998 onward, conversing with him and providing crisis intervention. He recalled that appellant mentioned that Dr. Bostrom's murder and the August 1997 double homicide "precipitated a decline in [his] ability to meet routine work and home responsibilities." Dr. Middleton related that appellant used alcohol to "manage unpleasant thoughts and feelings associated with those events," as well as "disturbing thoughts and images" indicative of chronic PTSD." Dr. Middleton noted that, during formal contacts in the Employee Assistance Program, appellant discussed the loss of his house and "beloved cats to fire," evincing "symptoms of [a]cute [s]tress [d]isorder." Appellant also discussed having acute panic attacks while assigned to the G-Block segregated housing unit.

¹² In an undated letter received by the Office on March 27, 2003, appellant requested that the Office's Branch of Hearings and Review issue subpoenas to several witnesses he wished to call at an oral hearing. As the Office denied appellant's request for an oral hearing, appellant's subpoena request was rendered moot and the Office did not address the request in its March 28, 2003 decision.

¹³ *Trudy A. Scott*, 52 ECAB 309 (2001).

emotional reaction to employment matters but such matters are not related to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment.¹⁴

In this case, the Office accepted two compensable employment factors: the 1997 double homicide in which appellant saw one wounded and one dead inmate and chased four armed assailants;¹⁵ and that appellant had daily contact with dangerous felons. However, he submitted insufficient rationalized medical evidence to establish that these employment factors caused the claimed emotional condition. Dr. Bauer, an attending Board-certified internist, mentioned "pay cuts," "work reassignments," "demotions" and "job stressors[.]" in his February 7 and April 17, 2001 reports, but did not discuss the two accepted work factors. Dr. Hoffer, an attending Board-certified psychiatrist, noted that appellant had "problems" at work, but did not provide any further detail. Dr. Zola, an attending Board-certified internist, noted that appellant related "grisly images" of inmate assaults, but did not specifically mention the 1997 homicide and chase. In a September 23, 2002 report, Dr. Contri, an attending clinical psychologist, attributed appellant's symptoms, in part, to stress from the 1997 double homicide. However, Dr. Contri did not provide medical rationale explaining how and why the double homicide would cause or aggravate any emotional or psychiatric condition. Without such supportive rationale, Dr. Contri's opinion on causal relationship is of very little probative value and is insufficient to meet appellant's burden of proof.¹⁶

Appellant also attributed his claimed condition to several incidents accepted as factual, but noncompensable. He alleged a pattern of harassment by employing establishment officials, including writing obscenities on his work in 1999, making obscene telephone calls to his home from November 2000 to July 2001, a warden swearing at him on May 13, 2001 and coworkers joking about Dr. Bostrom's murder and his house fire. However, for harassment to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment are not compensable under the Act.¹⁷ In this case, appellant did not submit sufficient evidence to corroborate any of the alleged instances of harassment. Therefore, appellant has not substantiated his claims of harassment.

Regarding the denial of a hardship transfer in 1995, the denial of a promotion and a within grade increase, the Board has held that the employing establishment's denial of a request for a different job, promotion or transfer, is an administrative decision, which does not directly involve an employee's ability to perform work duties, but rather constitutes an employee's desire to work in a different position.¹⁸ The Board notes that if the evidence demonstrates that the

¹⁴ *Roger Williams*, 52 ECAB 468 (2001).

¹⁵ Appellant also alleged that he experienced fear following a 1993 inmate murder. However, he submitted insufficient factual evidence to establish the incident as a compensable factor of employment.

¹⁶ *Lucrecia M. Nielsen*, *supra* note 6.

¹⁷ *Marguerite J. Toland*, 52 ECAB 294 (2001).

¹⁸ *Ernest J. Malagrida*, 51 ECAB 287 (2000).

employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered. Nevertheless, a claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁹ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁰ In this case, appellant has not submitted sufficient evidence to demonstrate that the employing establishment acted unreasonably in denying his transfer request, promotion or within grade increase. Thus, appellant has not established these administrative actions as compensable employment factors. Likewise, regarding appellant's assignment in 1987 to the food service, demotion from case manager to corrections officer and changes in appellant's work shift, the Board has held that an employee's desire to work in a different position is not compensable.²¹

Appellant also attributed his condition, in part, to being given an unfavorable assessment while in training in 1987, not being recognized or rewarded for his work with Mr. Bailey's client in 1991 or preventing a murder in 1996, being criticized for calling a gun tower for help during an April 1987 assault and not receiving an outstanding rating for his actions during the 1997 double homicide. A claimant's reaction to an assessment of performance is not compensable under the Act and there is no showing of error or abuse regarding appellant's performance appraisals.²² Regarding the destruction of appellant's house by fire on May 12, 2000, also engendering the death of three of his pet cats, the record demonstrates that appellant's home was on the employing establishment's "reservation." However, there is no indication of record that appellant was required to live there as part of his job or that the employing establishment received a substantial benefit by appellant living on the reservation. Therefore, he has not established that the house fire occurred in the performance of duty and thus, the fire is not a compensable factor of employment.

Appellant also attributed his condition to working 12-hour shifts 6 days per week during 1995 prison riots. The Board has held that overwork may be a compensable factor of employment.²³ However, appellant submitted insufficient factual evidence, such as time cards and duty rosters showing the specific dates and hours of overtime work, to corroborate his allegations of overwork. He also attributed his condition to charges of abuse of leave in 1995 following family deaths and in early 2000 after an episode of right-sided trunk pain and disciplinary charges for not following the chain of command in reporting the gas leak in July 2000. However, disciplinary matters are generally held to be administrative functions of the employer not within a claimant's assigned duties, unless error or abuse is shown.²⁴ Appellant

¹⁹ *Andrew J. Sheppard*, 53 ECAB ____ (Docket No. 00-1228, issued October 15, 2001).

²⁰ *Myrna Parayno*, 53 ECAB ____ (Docket No. 01-1101, issued June 12, 2002).

²¹ *Ernest St. Pierre*, 51 ECAB 623 (2000).

²² *Felix Flecha*, 52 ECAB 268 (2001).

²³ *Sandra F. Powell*, 45 ECAB 877 (1994); *William P. George*, 43 ECAB 1159 (1992); *Georgia F. Kennedy*, 35 ECAB 1151 (1984).

²⁴ *James E. Norris*, *supra* note 8.

has not submitted evidence indicating that the employing establishment erred or acted abusively with regard to these incidents. Thus, these disciplinary matters are not compensable factors of employment.

Appellant also alleged that he witnessed 1987 and 1993 assaults, that the employing establishment was negligent in not having working fire hydrants, refused to provide the fire crew with a map to appellant's house and refused to repair the bachelor officer's quarters in May 2000. However, he submitted insufficient evidence to establish that these incidents occurred as alleged. Without sufficient corroboration, these incidents cannot be established as factual. Appellant also attributed his condition to the illness and death of his father, the severe injury and death of his mother, the murder of Dr. Bostrom, allegedly being threatened by Dr. Bostrom's estranged husband, the death of three of his cats and losing another cat on the prison grounds. The Board acknowledges that appellant has experienced a number of personal tragedies. However, as these events did not occur in the performance of duty, appellant's reaction to them is not compensable under the Act. Consequently, appellant has not established that he sustained an employment-related emotional condition, as he submitted insufficient rationalized medical evidence to establish that the accepted work factors caused or aggravated the claimed condition.

Regarding the second issue, the Board finds that the Office properly denied appellant's March 5, 2003 request for an oral hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."²⁵ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely made after the 30-day period established for requesting a hearing or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.²⁶

In this case, appellant's March 5, 2003 request for an oral hearing was made following appellant's August 19, 2002 request for reconsideration. Therefore, the Office was correct in finding, in its March 28, 2003 decision, that appellant was not entitled to a hearing as a matter of right because he made his hearing request after he had requested reconsideration under section 8128(a) of the Act. The Board further finds that the Office properly exercised its discretion by conducting a limited review of the new evidence submitted and determining that the issue of causal relationship could be pursued equally well through submission of new, relevant evidence on reconsideration.²⁷ Therefore, the Office's March 28, 2003 decision denying appellant's request for an oral hearing under section 8124 of the Act was correct under the law and facts of this case.

²⁵ 5 U.S.C. § 8124(b)(1).

²⁶ *Claudio Vasquez*, 52 ECAB 496 (2001).

²⁷ *Frederick D. Richardson*, 45 ECAB 454 (1994); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated March 28, 2003 and November 15, 2002 and dated and finalized June 14, 2002, are hereby affirmed.

Dated, Washington, DC
September 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member