

burden of proof to establish that he sustained an emotional condition in the performance of duty.² The Board found that appellant had not established any of his claimed employment factors.³ The Board determined that appellant had not established that he was harassed or discriminated against by his supervisors or coworkers. It noted that several statements of record from a supervisor either lacked detail or related to comments not made in appellant's presence. It further determined that appellant's concern over his transfer in 1996 was not compensable because it did not involve his regular or specially assigned work duties but rather constituted his desire to work in a different position. Moreover, the Board found that the Office did not commit error or abuse when handling the administrative aspects of the 1996 transfer. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On September 25, 2002 appellant requested reconsideration of his claim. In support of his request, he submitted a statement from his attorney who argued that a ruling of the U.S. Court of Appeals for the Fifth Circuit established that personnel at the employing establishment committed harassment and discrimination of appellant as alleged in his emotional condition claim. Appellant's attorney claimed that the ruling reversed a district court's vacation of a jury's finding of discrimination.

In an attached copy of a September 12, 2002 ruling, the U.S. Court of Appeals for the Fifth Circuit explained that the U.S. District Court for the Western District of Texas, El Paso Division, had set aside a jury verdict in favor of appellant because it had improperly instructed the jury that the employing establishment was liable if it discriminated "because of" appellant's disability, rather than "solely because of" the disability.⁴ The appeals court noted that the district court had granted the employing establishment summary judgment with respect to this disability-based discrimination aspect of appellant's case.⁵ The appeals court determined that the

² In April 1997 appellant, then a 42-year-old supervisory customs inspector, filed a claim alleging that he sustained an emotional condition as a result of employment incidents and conditions. By decision dated December 2, 1997, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. By decision dated January 14, 1999, the Office affirmed its December 2, 1997 decision.

³ Appellant alleged that he was subjected to harassment and discrimination by a supervisor, Gurdil Dhillon. He claimed that Mr. Dhillon told another supervisor, Armando Jordan, that he was unprofessional, incompetent and unfit for his work unit. Appellant asserted that Mr. Jordan told him that Mr. Dhillon had advised the district director that his work "did not meet standards." He alleged that Mr. Dhillon exhibited a pattern of discriminating against minorities and that he was treated differently from nonminorities. Appellant asserted that in March 1996 Mr. Dhillon unfairly requested that he be transferred from his work unit and asserted that the transfer which occurred in April 1996 was improper. Appellant claimed that, after the transfer, his coworkers made degrading comments such as calling him ignorant and incompetent.

⁴ The appeals court indicated that appellant claimed that, after he filed the present emotional condition claim with the Office on April 1997, Frank Fuentes, a supervisor, made derogatory comments about his claimed emotional condition, made it difficult for him to attend psychiatric therapy sessions and threatened to terminate his employment due to psychiatric-based work restrictions imposed by his physician.

⁵ The appeals court also indicated that the district court granted the employing establishment summary judgment with respect to the hostile work environment and Title VII retaliation aspects of appellant's case. In its ruling, the appeals court affirmed the granting of summary judgment with respect to these aspects of appellant's case.

proper standard for discrimination suits filed under the Rehabilitation Act, as was appellant's suit, was whether the employer discriminated "solely because of" the disability and found that the district court correctly found that the jury had been improperly instructed. The appeals court determined, however, that it was improper for the district court to grant the employing establishment summary judgment as it was still possible, when considering the evidence in the light most favorable to appellant, for a reasonable jury to have found that the employing establishment discriminated "solely because of" appellant's disability. The appeals court remanded the case to the district court for further proceedings consistent with its decision.

By decision dated July 2, 2003, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.⁶

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁷ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction in force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

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.⁹ 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.¹⁰

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 a physician when providing an opinion on causal relationship and which working conditions are not deemed

⁶ The Office indicated that appellant claimed he previously filed a reconsideration request on September 13, 2001. Noting that it could find no evidence of this request, the Office indicated that it would review appellant's case on the merits in order to preserve his appeal rights.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁰ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

factors of employment and may not be considered.¹¹ If a claimant 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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹²

ANALYSIS

In the present case, appellant filed a claim in April 1997, alleging that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated December 2, 1997, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. By decision dated January 14, 1999, the Office affirmed its December 2, 1997 decision. By decision dated October 26, 2000, the Board affirmed the Office's January 14, 1999 decision and, by decision dated July 2, 2003, the Office denied modification of its prior decisions.

In its October 26, 2000 decision, the Board considered appellant's allegations, made in connection with his April 1997 claim, that he was subjected to harassment and discrimination by Mr. Dhillon, a supervisor, as well as by other supervisors and coworkers. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹³ However, for harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination did in fact occur.¹⁴ The Board found that appellant had not met this standard for establishing harassment or discrimination.

In connection with a September 25, 2002 reconsideration request, appellant submitted a September 12, 2002 ruling of the U.S. Court of Appeals for the Fifth Circuit which he contended established his prior allegations that he was harassed and discriminated against at work. Appellant argued that the portion of the appeals court ruling dealing with his claims of disability-based discrimination supported the allegations in his emotional condition claim. The Board finds, however, that the appeals court ruling is of little probative value concerning the relevant issue of the present case. First, the appeals court ruling does not contain any substantive findings supporting appellant's allegations that employing establishment personnel committed harassment or discrimination. The appeals court issued an interlocutory ruling by finding that it was improper for the district court to grant the employing establishment summary judgment

¹¹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹² *Id.*

¹³ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

regarding appellant's claim that he was discriminated against due to his alleged disability.¹⁵ The appeals court remanded the case to the district court for further proceedings but made no findings regarding appellant's claims of disability-based discrimination. Moreover, it is not clear that the appeals court ruling deals with matters related to the allegations made in connection with the present emotional condition claim. The appeals court noted that appellant's claim of disability-based discrimination was based on alleged actions of a supervisor, Mr. Fuentes, which occurred after the filing of the April 1997 claim. Appellant had not previously claimed before the Office that he sustained stress due to the actions of Mr. Fuentes; nor did he clearly make such a claim in connection with the September 25, 2002 reconsideration request.

In the October 26, 2000 decision, the Board also considered and denied appellant's allegations, made in connection with his April 1997 claim, that he sustained stress due to being transferred to another work unit in April 1996 and due to errors the employing establishment made in authorizing and carrying out the transfer. The Board determined that appellant's concern over the transfer did not relate to a compensable employment factor as it did not involve his ability to perform his regular or specially assigned work duties but rather constituted his desire to work in a different position.¹⁶ The Board also found that the employing establishment did not commit error or abuse in conjunction with the administrative function of authorizing and handling appellant's transfer.¹⁷ The September 12, 2002 ruling of the U.S. Court of Appeals and the argument appellant submitted in connection with his September 25, 2002 reconsideration request do not have any relevance to this aspect of the appellant's emotional condition claim.

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.¹⁸

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹⁵ The appeals court determined that the proper standard for discrimination suits filed under the Rehabilitation Act, as was appellant's suit, was whether the employer discriminated "solely because of" the disability and found that the district court correctly found that the jury had been improperly instructed. In setting aside the summary judgment, the appeals court found that it was still possible, when considering the evidence in the light most favorable to appellant, for a reasonable jury to have found that the employing establishment discriminated "solely because of" appellant's disability. The appeals court also affirmed the granting of summary judgment to the employing establishment with respect appellant's claims of a hostile work environment and Title VII retaliation.

¹⁶ See *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

¹⁷ The Board has found that an administrative or personnel matter, while not a duty of the employee, will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employer. See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁸ 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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2003 is affirmed.

Issued: April 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member