

**United States Department of Labor  
Employees' Compensation Appeals Board**

MICHAEL G. APONTE SINGALA, Appellant	)	
	)	
and	)	<b>Docket No. 04-1879</b>
	)	<b>Issued: December 6, 2004</b>
DEPARTMENT OF AGRICULTURE, FIELD	)	
OFFICE, Humacao, PR, Employer	)	
	)	

*Appearances:*  
Rafael A. Oliveras Lopes de Victoria, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On July 20, 2004 appellant, through his representative, filed a timely appeal from a May 21, 2004 merit decision of the Office of Workers' Compensation Programs in which a hearing representative affirmed a finding that he had not established an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

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

**FACTUAL HISTORY**

On August 14, 2002 appellant, then a 41-year-old soil technician, filed an occupational disease claim alleging that he had depression caused by his supervisor's "hostile, intimidating, coercive and harassing treatment." On the reverse side of the claim form, appellant's supervisor denied harassing him and stated that he was complying with "supervisory responsibilities."

In response to the Office's request for additional information, appellant submitted a statement dated November 15, 2002 relating that he initially submitted the occupational disease claim in order to claim sick leave and that the employing establishment sent the claim form to the Office without authorization. Appellant noted that his condition worsened when, as the result of a grievance, the employing establishment relocated him to another work site. During the grievance process, he negotiated for a transfer close to his present position but instead was sent further away. Appellant stated that in August 1998 he had a similar emotional condition after being assigned to a field office two hours away from his current location but that the union intervened and he was reassigned.

The record indicates that on June 19, 2002 appellant filed a grievance against his supervisor, Jose Aponte, for hostile and harassing treatment. Mr. Aponte denied appellant's grievance on July 3, 2002 noting that he treated appellant with "respect, courtesy and dignity." In a decision dated August 5, 2002, an official with the employing establishment determined that Mr. Aponte did not create a hostile work environment for appellant. He further granted his request for a transfer to a new work location.

In a statement from appellant to his union representative, received by the Office on November 19, 2002, he indicated that Mr. Aponte became his supervisor on February 11, 2002. He related that Mr. Aponte questioned his work hours of 6:30 a.m. to 3:00 p.m. and requested that he work the hours listed by payroll as his schedule, 7:00 a.m. to 3:30 p.m., until a formal change could be processed. Appellant noted that after explaining why he needed a work schedule of 6:30 a.m. to 3:00 p.m. Mr. Aponte agreed to informally permit him to work those hours. He additionally related that Mr. Aponte questioned a code that he used in payroll. Appellant further maintained that the employing establishment disregarded a conflict of interest in its hiring.

Appellant submitted medical evidence in support of his claim.

By letter dated April 21, 2003, an official with the employing establishment noted that it was standard procedure to submit occupational disease claims to the Office. The official further stated that as a result of the grievance appellant was reassigned to an office five miles further away from his home. She related that Mr. Aponte questioned appellant's work schedule because there was none on file. The official noted that the other allegations made by appellant were part of a settled grievance finding no hostile work environment.

In a decision dated June 28, 2003, the Office denied appellant's claim on the grounds that he had not established an injury as alleged. The Office determined that appellant had not established any compensable employment factors.

On June 9, 2003 appellant requested an oral hearing. At the hearing held on April 8, 2004, he objected to the employing establishment's submission of written evidence on the grounds that it prevented cross examination. He related that, when he began working in his current location, the Humacao field office, it was not organized or clean and he did not have "a full workload." Appellant stated that when Mr. Aponte began working there he "started questioning my incoming and outgoing work schedule" and questioned everything "at the technical and administrative level" with a "sarcastic, joking attitude." Appellant discussed his

prior work location in Caguas and his transfer to a workstation far from his home. He noted that he was then relocated to the Humacao field office, which was 1 hour and 15 minutes from his home. Appellant stated that he did not have a government vehicle. He related that, as a result of the grievance, the employing establishment transferred him an hour and a half away from his home. Appellant noted that he never worked in the new location due to his psychiatric problems.

In a decision dated May 21, 2004, a hearing representative affirmed the Office's June 28, 2003 decision after finding that appellant had not established any compensable employment factors.

### **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.<sup>1</sup> 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.<sup>2</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.<sup>3</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>4</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>5</sup>

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee, did in fact occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>6</sup> A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>2</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>3</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>4</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>5</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>6</sup> See *Michael Ewanichak*, 48 ECAB 364 (1997).

Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>7</sup> The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>8</sup> The primary reason for requiring factual evidence from the claimant is support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.<sup>9</sup>

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 factors of employment and may not be considered.<sup>10</sup> 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.<sup>11</sup>

### ANALYSIS

Appellant did not attribute his emotional condition to an inability to perform the duties of his position as soil technician. Instead, he maintained that his supervisor, Mr. Aponte, harassed him and created a hostile work environment. The Board has held that actions of an employer which the employee characterized as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur.<sup>12</sup> Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.<sup>13</sup> Appellant related that Mr. Aponte questioned him in a sarcastic and joking manner about both technical and administrative matters, including his work schedule. He did not, however, provide any corroborating evidence such as a statement from a witness substantiating his charges. Mr. Aponte denied harassing appellant. A grievance filed by appellant against Mr. Aponte was settled on August 5, 2002 with a specific

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<sup>7</sup> See *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

<sup>8</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>9</sup> *Beverly R. Jones*, 55 ECAB \_\_\_\_ (Docket No. 03-1210, issued March 26, 2004).

<sup>10</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> *Lori A. Facey*, 55 ECAB \_\_\_\_ (Docket No. 03-2015, issued January 6, 2004); *Charles D. Edwards*, *supra* note 7.

<sup>13</sup> *Id.*

finding that Mr. Aponte had not created a hostile work environment for appellant. An employee's allegation that he was harassed or discriminated against is not determinative of whether or not the alleged incident of harassment or discrimination occurred.<sup>14</sup> As appellant has not submitted sufficient evidence to establish the necessary factual basis for his claim of harassment by supporting his allegations with probative and reliable evidence, he has not established a compensable employment factor.<sup>15</sup>

Appellant further alleged that he had difficulty receiving sick leave. He stated that he initially filed his emotional condition claim to request sick leave and that the employing establishment forwarded the claim to the Office without authorization. The Board has repeatedly held that procedures regarding leave usage and matters relating to the handling of a workers' compensation claim pertain to personnel functions of the employer, rather than duties of the employee and are not compensable absent evidence that the employing establishment erred or acted abusively in carrying out its administrative function.<sup>16</sup> The employing establishment noted that it forwarded appellant's workers' compensation claim to the Office in accordance with established procedures. He has not submitted any evidence showing error or abuse by the employing establishment regarding a leave request or forwarding his claim to the Office and thus, has not established a compensable employment factor.

Appellant additionally asserted that Mr. Aponte questioned his start and ending time and required him to change his work schedule from 6:30 a.m. to 3:00 p.m. to his payroll schedule of 7:00 a.m. to 3:30 p.m. He additionally noted that Mr. Aponte questioned a code that he placed on his payroll form. An employee's complaints concerning the manner in which a supervisor exercises his or her duties as a supervisory discretion fall, as a rule, outside the scope of coverage of the Act.<sup>17</sup> This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be compensable absent evidence of error or abuse.<sup>18</sup> Likewise, the assignment of a work schedule or tour of duty is an administrative function of the employing establishment and absent error or abuse does not constitute a compensable factor of employment.<sup>19</sup> In this case, an official with the employing establishment noted that Mr. Aponte questioned appellant's work schedule because it was not on

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<sup>14</sup> *Linda J. Edwards-Delgado*, 55 ECAB \_\_\_\_ (Docket No. 03-823, issued March 25, 2004).

<sup>15</sup> *See Charles D. Edwards*, *supra* note 7.

<sup>16</sup> *James P. Guinan*, 51 ECAB 604 (2000); *Bettina M. Graf*, 47 ECAB 687 (1996).

<sup>17</sup> *Christophe Jolicoeur*, 49 ECAB 553 (1998).

<sup>18</sup> *Id.*

<sup>19</sup> *Peggy R. Lee*, 46 ECAB 521 (1995).

file. Appellant has not submitted any evidence of error or abuse to substantiate that his supervisor acted unreasonably in performing his supervisory function or assigning a work schedule.<sup>20</sup>

Regarding appellant's contention that he did not have a full workload when he began work at his present location, the Board has held that an employee's dissatisfaction with holding a position in which he feels underutilized is not a compensable employment factor.<sup>21</sup> A claimant's reaction to such conditions and incidents at work must be considered self-generated and resulting from his frustration in not being permitted to work in a particular environment or to hold a particular position.<sup>22</sup>

Appellant next alleged that his reassignment to a location further from his home worsened his condition such that he was unable to work. The employing establishment, in response to a request from appellant as part of his grievance, transferred him to a location five miles away from his current location. He related that it would increase his commuting time. He stopped work prior to reporting to the new location. Matters regarding transfers, however, are not compensable factors of employment without a showing of error or abuse as they do not involve the employee's ability to perform his regular or specially assigned work duties, but rather constitute a desire to work in a different position.<sup>23</sup> In this case, appellant has submitted no evidence showing that the transfer was erroneous. Moreover, it appears that the transfer was made at appellant's request<sup>24</sup> and that he stopped work prior to reporting to his new location. Thus, he has not established a compensable factor of employment.

On appeal appellant's attorney contends that appellant was denied his right to due process because he was unable to cross examine the officials at the employing establishment who submitted written statements. The hearing representative had the authority to compel the attendance of witnesses. Appellant's attorney did not make any request that subpoenas be issued for witnesses. He, therefore, cannot argue that he was denied the right to examine or cross examine witnesses.<sup>25</sup>

Appellant's attorney also contends that the hearing representative failed to properly consider the medical evidence of record. A physician's opinion that a psychiatric or emotional condition is employment related is not, of itself, sufficient to establish a compensable employment-related condition. The Office must first determine whether appellant identified any

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<sup>20</sup> Appellant has not alleged an inability to perform his regularly assigned job duties due to a change in shift, but instead alleged that his supervisor questioning his schedule created a hostile work environment. *See Penelope C. Owens*, 54 ECAB \_\_\_\_ (Docket No. 03-1078, issued July 7, 2003).

<sup>21</sup> *Paul L. Stewart*, 54 ECAB \_\_\_\_ (Docket No. 03-1107, issued September 23, 2003).

<sup>22</sup> *Id.*

<sup>23</sup> *Hasty P. Foreman*, 54 ECAB \_\_\_\_ (Docket No. 02-723, issued February 27, 2003).

<sup>24</sup> *See Linda K. Mitchell*, 54 ECAB \_\_\_\_ (Docket No. 03-1281, issued August 12, 2003).

<sup>25</sup> *See Monroe E. Hartzog*, 40 ECAB 322 (1988).

compensable employment factors as the cause of the claimed emotional condition.<sup>26</sup> As the hearing representative found that appellant had not established any compensable employment factors, he properly did not consider the medical evidence.

Appellant's attorney also argues that the hearing representative failed to properly consider the increase in commuting time necessitated by appellant's transfer to a new work location. The Board has held, however, that the stress and strain of highway travel experienced by an employee commuting to work can be characterized as self-generated and arising from the hazards of the journey shared in common by all travelers.<sup>27</sup>

### **CONCLUSION**

The Board finds that appellant has not established an emotional condition in the performance of duty as he failed to substantiate any compensable factor of employment. As he did not establish any compensable employment factor, it is not necessary to address the medical evidence.<sup>28</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 21, 2004 is affirmed.

Issued: December 6, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>26</sup> *Santosh C. Verma*, 53 ECAB \_\_\_\_ (Docket No. 00-1512, issued December 12, 2001).

<sup>27</sup> *Adele Garafolo*, 43 ECAB 169 (1991).

<sup>28</sup> *See Hasty P. Foreman*, *supra* note 23; *Margaret S. Krzycki*, 43 ECAB 496 (1992).