

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

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**FRANCIS A. FALVO, Appellant**

**and**

**DEPARTMENT OF DEFENSE, DEFENSE  
FINANCE ADMINISTRATION ACCOUNTING  
SERVICE, Rome, NY, Employer**

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**Docket No. 02-465  
Issued: September 3, 2004**

*Appearances:*  
*Edmund J. Wiatr, Jr., 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  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On January 7, 2002 appellant, through his representative, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 1, 2001, denying his emotional condition on the grounds that it was not sustained 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.<sup>1</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

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<sup>1</sup> Appellant, through his representative, requested an oral argument before the Board. This oral argument was scheduled for July 6, 2004. As appellant, nor his representative appeared, the Board will consider this case based on the record.

## **FACTUAL HISTORY**

On July 29, 1999 appellant, then a 45-year-old accounting technician, filed a notice of occupational disease alleging that he developed stress and depression as a result of his wrongful dismissal on May 20, 1999 and to “situations that happened” at the employing establishment.

The Office requested additional information by letter dated March 23, 2000. Counsel for appellant responded on April 5, 2000 noting that appellant was a hemiplegic with cognitive dysfunction and that his position was in concert with the state vocational education services for individuals with disabilities. He stated that appellant was subjected to gossip, innuendo and unfounded remarks by his supervisors and coworkers. Counsel noted disagreement regarding remarks about a gun, involuntary dismissal from the employing establishment as well as the employing establishment’s refusal to provide appellant with his last official performance appraisal. On May 31, 2000 counsel alleged that the employing establishment improperly terminated appellant under the pretext that he had made statements about bringing or using a gun at the employing establishment. He asserted that Chris Russo, a coworker, exonerated appellant from these charges.

In a report dated April 16, 2000, Dr. Daniel N. Uwah, a Board-certified psychiatrist, noted appellant’s symptoms of depression including irritability. He stated that appellant’s precipitating stressors including being dismissed abruptly on May 20, 1999. Dr. Uwah diagnosed dysthymic disorder and attributed this condition to appellant’s dismissal on May 20, 1999.

By decision dated November 18, 2000, the Office denied appellant’s claim finding that he failed to provide specific detailed allegations and failed to establish a compensable factor of employment.

Counsel requested an oral hearing on appellant’s behalf on December 20, 2000. He submitted a brief written contending a wrongful discharge and asserted that the employing establishment denied appellant reasonable accommodation, that appellant’s appointment should have been for two years, rather than one as asserted by the employing establishment and that appellant’s removal from the employing establishment premises on May 20, 1999 was absent due process. Counsel noted that Larry Scarafile, a coworker, reported overhearing appellant make threats concerning the use of a gun. He asserted that the other party to this conversation, Mr. Russo, rebutted the allegations of a gun threat. Counsel argued that the employing establishment improperly withheld a copy of appellant’s most recent performance appraisal. He stated that the employing establishment reported that appellant was released due to lack of work, but that 12 new employees were recently hired.

Appellant and his representative testified at an oral hearing held on July 11, 2001. Counsel stated that appellant was hired with special consideration of his physical conditions and was entitled to a two-year trial period. Appellant alleged that he was subjected to harassment and discrimination as he needed to eat when taking his medications. He alleged that, while female coworkers were allowed to eat at their desks without comment, he received an email criticizing him for eating at his desk. Appellant stated that the employing establishment denied his requests for reassignment. He noted that he was slow making copies due to his disability and

that his separate claim for a knee condition was denied. Appellant stated that his supervisor criticized him for taking too long in the bathroom. He had assigned parking, but that the employing establishment moved the location of the entrance. Appellant stated that his coworkers laughed about his walk and his falls into his desk. He stated that on May 20, 1999 his supervisor called him to a meeting and informed him that, although he was not a security threat, he would be involuntarily removed from the building. A coworker informed appellant that there were rumors that he was going to come to the employing establishment with a gun. Appellant denied making any statement about a gun. Counsel stated that appellant's coworker, Mr. Scarafile reported to supervisor Shelia Moody that he had overheard appellant make a comment to Mr. Russo about a gun. Under oath Mr. Russo denied that appellant made such a statement.

In a decision dated March 26, 2001, Peter A. Prosper, a federal mediation arbitrator, determined that the employing establishment properly terminated appellant. The arbitrator found that appellant was hired in a temporary time-limited appointment not to exceed one year and that the employing establishment indicated that he would be renewed upon completion of satisfactory service. Mr. Prosper found that appellant was unable to perform his required duties and that the employing establishment accommodated him by reducing his workload and providing him with a second desk and other equipment.

The employing establishment contended that appellant was hired as a temporary appointment and was not entitled to the due process requirements of a permanent employee. The employing establishment stated that appellant was unable to perform the duties of his position and consequentially his workload was reduced. Ms. Moody, appellant's supervisor, decided to recommend that his appointment not be renewed. The employing establishment stated: "At some time in May 1999, Mr. Scarafile, [appellant's] coworker, overheard a conversation between [appellant] and Mr. Russo about [appellant's] appointment not having been renewed. At one point in the conversation, Mr. Scarafile heard [appellant] say that maybe he (appellant) should bring a gun in and 'shoot up the place.'" As a result of this comment, the employing establishment placed appellant on paid administrative leave on May 20, 1999 until his appointment expired on May 25, 1999. Appellant received full pay from May 20 through May 25, 1999. The employing establishment acknowledged that he should have received an annual performance rating and that had he received one it would have been unacceptable.

On July 17, 2001 counsel stated that he observed appellant's coworkers exhibit a disdain for appellant's handicapped status.

Appellant alleged that the employing establishment discriminated against him based on his handicapped status by refusing to provide him with reasonable accommodations and by giving him poor performance reviews.

In an affidavit dated October 19, 1999, counsel noted that Sue Moore, a supervisor suggested that appellant was coming to work late and was eating breakfast at his desk. Counsel advised Ms. Moore that appellant was late due to the employing establishment's failure to provide him with a handicapped parking place that was near the office entrance. Ms. Moore agreed that appellant could eat a few cookies prior to taking his medication. Counsel explained that appellant's prior medication made him drowsy, but that he had changed medications. He alleged that Ms. Moore reported appellant's work performance as fully successful. Counsel

noted that appellant was asked to leave the premises on May 20, 1999 and to surrender his entrance badge. David Metzgar denied that appellant was a security risk. Roy Higgins stated that appellant was removed because of statements made about a gun.

Appellant asserted that Ms. Moore emailed him regarding his late arrival at work and eating breakfast. He reported that he witnessed coworkers eating at their desks. Appellant stated that on May 18, 1999 his supervisor informed him that his appointment would not be extended. He stated that, following this meeting, he told Mr. Russo that his appointment was not to be renewed and stated: "Don't worry you're not going to read about me in the papers tomorrow, that I've shot myself in the mouth or anything like that." May 20, 1999 Mr. Metzgar asked appellant to clean out his desk and leave and informed him that he would receive pay through his anniversary date. Appellant stated: "Dave, I don't have an Uzi, I'm not going to come back here and shoot anyone."

By decision dated October 1, 2001, the hearing representative found that appellant had not established a compensable factor of employment and denied his claim.

### **LEGAL PRECEDENT**

To establish an occupational disease claim that he has 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 her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>2</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty; and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>3</sup>

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 illness has some connection with the employment, but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>4</sup>

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<sup>2</sup> *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

<sup>3</sup> *Id.*

<sup>4</sup> *Lillian Cutler*, 28 ECAB 125, 129-131 (1976).

In cases involving emotional conditions, when working conditions are alleged as factors causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensation 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>5</sup> Perceptions and feelings alone are not compensable to establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence. Only when the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, should the Office consider the medical evidence of record to determine the causal relationship between the accepted factors and the diagnosed condition.<sup>6</sup>

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Federal Employees' Compensation Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>7</sup>

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>8</sup>

### ANALYSIS

Appellant attributed his emotional condition to actions by the employing establishment, including the termination of his appointment at one year, the request that he surrender his badge and leave the employing establishment prior to his last day of work due to alleged remarks regarding a gun and the failure of the employing establishment to provide him with a final performance appraisal. These allegations related to administrative and personnel matters and do not fall within the coverage of the Act unless the evidence discloses error or abuse on the part of the employing establishment. Regarding the termination of his temporary appointment at one year, the arbitrator's decision upheld the employing establishment's determination that this was

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<sup>5</sup> *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

<sup>6</sup> *Id.*; *Fred Faber*, 52 ECAB 107, 110 (2000).

<sup>7</sup> *Martha L. Watson*, 46 ECAB 407 (1995).

<sup>8</sup> *Alice M. Washington*, 46 ECAB 382 (1994).

appropriate. Appellant has not submitted any additional evidence establishing error or abuse in this action.<sup>9</sup> He has not established a compensable factor of employment in this instance.

Appellant alleged that the employing establishment erred or was abusive in asking him to surrender his badge on May 20, 1999 in response to a coworker's assertion that he had made threatening statements. The Board finds that appellant has not submitted sufficient evidence to establish error on the part of the employing establishment. While appellant denied making a statement about a gun, he acknowledged that he referenced shooting in the conversation with Mr. Russo in response to the failure of the employing establishment to renew his temporary appointment. This is the conversation overheard by Mr. Scarafile and reported to appellant's supervisor. There is no evidence that the employing establishment erred by taking action regarding appellant's statement by requesting that he surrender his badge, leave the building and placing him on paid administrative leave until the termination date of his temporary appointment.<sup>10</sup>

Appellant further alleged that the employing establishment failed to provide him with a final performance appraisal. The employing establishment acknowledged that he had not received his final performance appraisal and that he was entitled to it. The employing establishment erred in failing to provide appellant with a performance appraisal and the Board finds that he has substantiated a compensable factor of employment in this administrative matter.

Appellant also alleged that the employing establishment failed to accommodate his physical restrictions. The arbitrator found that the employing establishment did accommodate appellant by reducing his workload and providing him with additional equipment. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.<sup>11</sup> However, in this case, the record reflects that the employing establishment complied with appellant's physical restrictions. Therefore, he has not established a compensable factor of employment with respect to this issue.

Appellant also alleged that his emotional condition resulted from gossip and rumors regarding the gun comment. The Board has held that fear of gossip is a personal frustration which is clearly not related to job duties or requirements and thus, is not compensable.<sup>12</sup>

Appellant attributed his condition to the denial of his requests for reassignment. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather

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<sup>9</sup> *Felicia L. Pfouts*, Docket No. 03-716 (issued June 9, 2003).

<sup>10</sup> Compare *James M. Jewell*, Docket No. 03-1264 (issued October 7, 2003), (finding that appellant had established error and abuse due to removal from the premises through a Merit Systems Protection Board's decision).

<sup>11</sup> *Phillip L. Barnes*, 55 ECAB \_\_\_\_ (Docket No. 02-1441, issued March 31, 2004).

<sup>12</sup> *Gracie A. Richardson*, 42 ECAB 850, 853 (1991).

constitute a desire to work in a different position.<sup>13</sup> Appellant has not established a compensable employment factor under the Act in this respect.

Appellant asserted that he experienced harassment and discrimination through the above described events. He alleged that he was the only employee criticized for eating at his desk, while his fellow employees frequently ate meals at their desks. Appellant alleged that his coworkers made fun of his physical disabilities by laughing or commenting when he stumbled or fell. Counsel stated that he had observed appellant's coworker's exhibit disdain for his disabilities. The Board has previously held that assertions of mistreatment by coworkers must be specific as to the dates, times and individuals alleged to have made comments and provide more than a perception of the motives of the individuals involved.<sup>14</sup> In this case, neither appellant nor his attorney provided specific allegations regarding the events or the persons involved. Therefore, these allegations are insufficient to establish harassment or discrimination. As appellant has not offered any supportive evidence corroborating that he experienced harassment or discrimination, he has failed to establish this aspect of his claim.

In the present case, appellant has established a compensable factor of employment with respect to the failure of the employing establishment to provide him with a final performance appraisal. However, his burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.<sup>15</sup>

The only medical evidence in the case record is a report dated April 16, 2000 from Dr. Uwah, a Board-certified psychiatrist, describing symptoms of depression, including irritability and stating that appellant's precipitating stressors including being dismissed abruptly on May 20, 1999. He diagnosed a dysthymic disorder and attributed this condition to appellant's dismissal on May 20, 1999. As the only accepted factor of employment is the failure of the employing establishment to provide appellant with a final performance appraisal, Dr. Uwah's April 16, 2000 report attributing appellant's condition to the decision of the employing establishment to remove him from work effective May 20, 1999 does not diagnose emotional condition to a compensable employment factor. Dr. Uwah did not attribute appellant's condition to any other employment events and did not mention the accepted employment factor as causing or contributing to the diagnosed condition. As the medical evidence does not establish a causal relationship between the accepted compensable employment factor and appellant's emotional condition, this evidence is insufficient to establish appellant's claim.

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<sup>13</sup> *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004).

<sup>14</sup> *Sherman Howard*, 51 ECAB 387, 391-92 (2000).

<sup>15</sup> *See William P. George*, 43 ECAB 1159, 1168 (1992).

**CONCLUSION**

The Board finds that appellant has substantiated a compensable employment factor, that the employing establishment erred in failing to provide him with his final performance appraisal. However, the Board further finds that the medical evidence submitted in support of appellant's claim is insufficient to establish a causal relationship between this employment factor and appellant's diagnosed condition and that, therefore, he has failed to meet his burden of proof in establishing that he developed an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member