



injury that he also claimed compensation for back injuries on October 23, 2001 and February 28, 2002 the latter of which was denied by the Office and that he had been out of work since April 25, 2002. Appellant claimed compensation for disability from April 26 to June 20, 2002.

Appellant submitted a May 20, 2002 report from Dr. Mikala A. Legako, a clinical psychologist, diagnosing adjustment disorder with anxiety and major depressive disorder, single episode, moderate. He stated that appellant was totally disabled from May 3 to 20, 2002 and that, "The adjustment disorder was brought on by work-related stress, interpersonal difficulties and chronic pain."

On June 26, 2002 the Office advised appellant that it needed a detailed description of the employment conditions or incidents to which he attributed his condition. He submitted a statement regarding his back condition after he returned to work, contending that he was forced to return to regular work when he was unable to do so. Appellant also submitted several medical reports regarding his back, which indicated that he first injured his back in a motor vehicle accident in 1980, that his back improved with physical therapy and that, beginning in 1997, he sustained back injuries at work. A lumbar magnetic resonance imaging (MRI) scan on November 6, 2001 showed multi-level degenerative disc disease and an annular tear at L2-3. Appellant also submitted a July 11, 2002 report from Dr. Legako stating that appellant "expressed to me that he has been increasingly depressed and anxious since the last exacerbation of his back injury in approximately July of 2001" and that the only relief from his chronic back pain came from a chiropractor but that he felt pain again when he had to lift or do repetitive actions on his job. Dr. Legako stated:

"[Appellant] has becoming [sic] increasingly distressed trying to resolve this problem and has felt unsupported and even harassed at work due to his physical condition. As is very common with any chronic medical problems, especially those involving chronic pain and any limitation in range of motion or flexibility, [appellant] has become depressed and now meets the criteria for a major depressive disorder."

By decision dated November 26, 2002, the Office denied appellant's claim for an emotional condition on the basis that he had not established harassment, disparate treatment or error or abuse in the employing establishment's administration of personnel matters.

Appellant requested a hearing before an Office hearing representative and submitted additional evidence, most of which related to his back condition. In a November 30, 2001 report Dr. Christopher R. Edwards, a Board-certified orthopedic surgeon, stating that appellant's "history regarding his back definitely dates back to previous injuries" and that this condition and his other medical problems were "not related to his worker's compensation injury in any way, shape or form." In a November 4, 2002 report, Dr. P. Kinnebrew, a Board-certified pediatrician, stated that the back injury for which he saw appellant on March 1, 2002 was likely not a new injury but was "more likely an aggravation or reoccurrence of the back injury for which he was initially seen on July 25, 2001." In an April 22, 2003 report, Dr. Howard J. Williams, III, a Board-certified anesthesiologist, stated that appellant's MRI scan findings helped explain his significant low back pain radiating to his left hip and leg.

In an August 12, 2002 report, Dr. Legako stated that appellant was “currently mentally incapacitated from duty and is receiving treatment to resolve major depression, anxiety issues and health issues related to chronic pain.” At a hearing held on August 27, 2003 appellant’s attorney contended that appellant’s psychological treatment for depression and anxiety was necessitated by his employment-related back pain, noting that the Office had accepted that he sustained a back injury in July 2001. Appellant testified that he was receiving treatment for his back but it was not approved by the Office, that he experienced daily back pain and that he was harassed at work by being told daily where to go on his breaks, who to talk to and not to talk to and where to go to work.

By decision dated November 6, 2003, an Office hearing representative found that appellant had not established any compensable factors of employment. Regarding the contention that his emotional condition was related to the chronic pain from his employment back injuries, the Office hearing representative found: “That issue should be adjudicated on its own merits under the appropriate case file.”

### **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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act. 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>1</sup>

The Board has held that actions of an employee’s supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. However, 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 alone of harassment or discrimination are not compensable under the Act.<sup>2</sup> Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.<sup>3</sup>

### **ANALYSIS**

Appellant attributed his emotional condition to his feeling that he was being punished and harassed by the employing establishment for his employment injury. The Office advised him that it needed a detailed description of the employment conditions or incidents to which he

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<sup>1</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

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

<sup>3</sup> *Joel Parker, Sr.*, 43 ECAB 220 (1991).

attributed his condition, but appellant did not submit such a description of specific incidents and conditions of his employment, which the Office needs to adjudicate his claim.<sup>4</sup>

The only specific allegation appellant made was that the employing establishment required him to work beyond his physical limitations. This could constitute a compensable employment factor if substantiated by the record,<sup>5</sup> but appellant has not submitted any evidence substantiating that this, in fact, occurred. At the hearing held on August 27, 2003 appellant contended that he was harassed by being told daily where to go on his breaks, who to talk to and not to talk to and where to go to work. Appellant has not submitted any evidence to substantiate these allegations which involve administrative or personnel matters. These would constitute compensable factors only if error or abuse by the employing establishment is shown.<sup>6</sup>

Appellant, however, has cited one potentially compensable factor of employment as a cause of his emotional condition: chronic pain and limitations resulting from his accepted employment injuries.<sup>7</sup> This has been part of his claim from the time he filed his claim, as shown by the language on his claim form and by the opinion on this issue in the reports he submitted from Dr. Legako. The Office has not adjudicated this aspect of appellant's claim and the Office hearing representative found that it should be adjudicated as part of his claim for a back condition.

The Board finds that appellant's contention that the chronic pain and limitations from his employment injuries resulted in his emotional condition should be adjudicated in his emotional condition claim. The Office's procedure manual states: "To the extent possible, the same claims examiner should handle all claims involving the same part of the body for a given claimant."<sup>8</sup> The present claim will be remanded to the Office for a determination of whether appellant's chronic pain is related to his employment injuries<sup>9</sup> and, if so, whether his emotional condition is related to his chronic pain.

### CONCLUSION

The Office properly found that appellant has not established that he was harassed or that the employing establishment committed error or abuse in the administration of personnel matters. The case will be remanded, however, for findings on appellant's contention that his

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<sup>4</sup> See *Richard J. Dube*, 42 ECAB 916 (1991).

<sup>5</sup> *Diane C. Bernard*, 45 ECAB 223 (1993).

<sup>6</sup> See *James W. Griffin*, 45 ECAB 774 (1994) (assignment of work); *Jimmy Gilbreath*, 44 ECAB 555 (1993) (monitoring of activities at work).

<sup>7</sup> *Clara T. Norga*, 46 ECAB 473 (1995); *Arnold A. Alley*, 44 ECAB 912 (1993).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.5b(4) (January 2004).

<sup>9</sup> The record does not contain the evidence needed to resolve this point. The medical evidence contains contradictory opinions and appellant testified at the August 27, 2003 hearing that the Office was no longer paying for treatment of his back condition.

emotional condition is related to the chronic pain resulting from his employment injuries to his back.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 6, 2003 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, as set forth in the above decision of the Board.

Issued: September 30, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member