

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

TERRY A. HOWE, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
BROADVIEW HEIGHTS MEDICAL CENTER,
Brecksville, OH, Employer**

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**Docket No. 05-279
Issued: April 25, 2005**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 8, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs' dated October 13, 2004, denying his emotional condition claim. Under 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty on and after April 18, 2003 as alleged.

FACTUAL HISTORY

On July 28, 2003 appellant, then a 49-year-old program coordinator for home-based primary care, filed a notice alleging that he sustained a recurrence of disability beginning in June 2002. He noted an accepted temporary aggravation of atypical bipolar affective disorder sustained on or before May 27, 1998, while working at an employing establishment facility in

Omaha, Nebraska.¹ Appellant requested a transfer to the employing establishment's Cleveland facility, reporting for duty in June 2002. He stopped work on April 28, 2003 and was off work through January 2004.

Appellant alleged a pattern of harassment and discrimination by Joseph R. Kohut his supervisor, and other employing establishment managers, causing depression, insomnia, suicidal ideation and difficulty functioning. He asserted that he was not given meaningful work from the time he reported for duty in June 2002 through mid-September 2002, that Mr. Kohut denied requested accommodations including supplemental performance feedback, tape recorded meetings, a compressed four-day work schedule and arriving 30 minutes after his scheduled start time. Appellant also asserted that these denials were discriminatory as another employee was permitted to work at home while recuperating from surgery. He alleged that on September 23, 2002, Mr. Kohut put him in charge of three "dysfunctional," "antagonistic" teams, but denied him the clerical support needed to do his job. Appellant asserted that his subordinates refused responsibility for a quality improvement program, forcing him to "absorb another functional responsibility." He alleged that Mr. Kohut yelled at him on three unspecified dates from October 2002 to April 2003. Appellant also alleged that on three unspecified dates, an unnamed manager "barged" into his meetings and disrupted the proceedings for no reason.

Appellant alleged that on April 8, 2003 Mr. Kohut harassed and embarrassed him by commenting that he could assist an injured employee who had inquired about obtaining compensation benefits as he was familiar with the process. On April 9, 2003 an unnamed supervisor called him at home asking why he was not at a meeting. Appellant explained that he had a scheduling conflict because of a medical appointment. The supervisor remarked that he wished the employing establishment had a "g-damn chief of staff who would do his job" as this incident was one of many scheduling conflicts. On April 10, 2003 Mr. Kohut called him "crazy" in front of eight coworkers, comparing him to an irate patient walking nearby. He asserted that Mr. Kohut remarked that he should give the patient some of his psychiatric medications. Appellant alleged that his workload and increasing stress necessitated working more than his scheduled 40 hours a week and that he had to come in earlier than his scheduled start time.

Appellant alleged that on April 10, 2003 Mr. Kohut told him that his team had lost confidence in him and that he would be reassigned, in part, because current medical reports stated that he was having great difficulty communicating. Appellant asserted that the employing establishment should not have solicited another candidate as he was qualified for the position, noting that the removal occurred only six weeks before he would have been eligible for reinstatement at Grade 13, Step 9. Mr. Kohut allegedly commented that the employing establishment approved the additional staff appellant had requested.

In an August 7, 2003 file memorandum, the Office indicated that appellant's July 28, 2003 claim for recurrence of disability be developed as an occupational disease claim as he

¹ The accepted emotional condition claim was assigned File No. 11-167255. This claim is not before the Board on the present appeal.

attributed the claimed period of disability to new work factors occurring after he transferred to the employing establishment's Cleveland facility.²

In August 19, 2003 letters, the Office requested that appellant and the employing establishment provide additional details regarding the implicated work factors.

In an August 28, 2003 letter, Mr. Kohut noted that, when appellant reported for duty in June 2002, he presented a June 11, 2002 medical report stating that he should be integrated into his new position very slowly, with an opportunity to approve each small step to maintain a sense of control. He gave appellant ample time to become familiar with the employing establishment's operations and his assigned duties. Mr. Kohut noted that at the time, appellant did not complain that the adjustment process was too slow. He alleged that appellant performed his managerial role "diligently" and did not complain of any difficulty doing his job. Regarding his request for a compressed schedule, Mr. Kohut explained that appellant's managerial responsibilities required his presence at the employing establishment Monday through Friday. When appellant submitted an April 26, 2003 medical report stating that his stress level might cause a breakdown, Mr. Kohut proposed to reassign him to a less stressful position with no management responsibility for the home-based care program. After initial resistance, appellant agreed to consider the reassignment. Mr. Kohut generally denied the allegations of harassment.³

By decision dated September 29, 2003, the Office denied appellant's claim on the grounds that he had not established any compensable factor of employment. The Office found that he established the following incidents as factual but noncompensable administrative matters: he was not assigned meaningful work in June 2002; he was assigned responsibility for three dysfunctional teams in September 2003; he had inadequate support staff; supervisors did not provide desired performance feedback; management reassigned him to a less stressful position; a manager interrupted his meetings; his request to tape meetings was denied. The Office further found that the following incidents were not established as factual: harassment; denial of reasonable accommodations; disparate treatment regarding denial of requested accommodations; being forced to work more than 40 hours a week; the April 9, 2003 telephone conversation with the program director regarding a scheduling conflict.

Appellant then requested an oral hearing, held May 18, 2004. He alleged that Mr. Kohut attempted to undermine his authority by giving his subordinates conflicting instructions. He also described an alleged April 10, 2003 incident in which Mr. Kohut remarked that an irate patient with mental illness was "crazy" like appellant.⁴

² The Office assigned the July 28, 2003 claim File No. 09-2036459.

³ In a September 4, 2003 letter, Mr. Kohut noted that appellant had telephoned him at home that evening to discuss what type of leave he should use. He instructed appellant as to how to get copies of the pertinent records from the Office.

⁴ At the hearing and in an October 13, 2004 memorandum, the Office hearing representative requested that the Office determine if medical benefits could still be paid under File No. 11-167255.

In a June 16, 2004 letter, Mr. Kohut explained that, when appellant reported for duty in June 2002 he was given “great latitude in the performance of his duties” both in recognition of his past work experience and his bipolar disorder. Regarding the April 8, 2003 incident, Mr. Kohut recalled that at a private meeting with the employing establishment’s director, it was “mentioned that one of our staff members was inquiring about filing a [compensation] claim. [He] suggested that [appellant] would be an appropriate mentor to assist the employee if they needed management help in having to deal with what [he] saw as a complicated, administrative system.” Mr. Kohut made the suggestion because appellant “could provide helpful guidance to one of his subordinate employees.” Regarding the April 10, 2003 incident, Mr. Kohut recalled that while he, appellant and other staffers were waiting to enter a meeting, “an irate patient was storming the hallway demanding medications and wanting to talk with the Director.” He approached and assisted the patient. When Mr. Kohut returned to the group, he made a “general comment ... that this patient needed medications just as some of us do and that we took care of his need.” He never referred to the patient as “crazy” and did not direct his comments to appellant. Mr. Kohut observed appellant’s facial expression, indicating that he may have misconstrued Mr. Kohut’s remark. Therefore, he “explained to [appellant] either at that moment or the following day what [he] meant” and apologized for any misperceptions. Regarding appellant’s request for a compressed schedule, Mr. Kohut explained primary care managers needed to be on site “during normal business hours five days a week” and that a four-day schedule would adversely affect patient care. In an attempt to accommodate him, Mr. Kohut offered him a nonmanagerial position in April 2003 with more scheduling flexibility.

In a June 16, 2004 letter, the employing establishment asserted that appellant had full control over how quickly to assume his duties in June 2002.

By decision dated and finalized October 13, 2004, the Office hearing representative affirmed the September 29, 2003 decision. The hearing representative found that appellant had failed to establish that he sustained an emotional condition as he did not establish any compensable factor of employment. Regarding the amount of work assigned to him in June 2002, the denial of his request for a compressed schedule and his April 2003 transfer to a nonmanagerial position, the hearing representative found that these were noncompensable, administrative functions of the employer and that Mr. Kohut’s explanations demonstrated no error or abuse. The hearing representative further found that appellant’s allegation that Mr. Kohut gave his subordinates conflicting instructions was a self-generated, noncompensable dislike of his supervisor’s managerial style. The hearing representative further found that his allegations that his job became very stressful in October 2002 were vague and unsubstantiated, including that the administrative support staff appellant requested were necessary for him to perform his job. He noted that Mr. Kohut explained that appellant had not complained of being unable to do his assigned duties. Regarding the April 8 and 10, 2002 verbal incidents, the hearing representative found that appellant’s reactions were self-generated misperceptions of Mr. Kohut’s remarks. He found Mr. Kohut’s explanation of the administrative incidents was reasonable and that no error or abuse was shown. Also, the hearing representative noted that the Office properly developed the July 28, 2003 claim as one for a new occupational condition and not a recurrence of disability.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.⁵ Where disability results from an employee's reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁶ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁷ 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.⁸

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.⁹ If a claimant implicates 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.¹⁰

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to an alleged pattern of harassment, discrimination and verbal abuse by his supervisor, Mr. Kohut and other employing establishment managers. The Office found in its October 13, 2004 decision that he failed to establish any compensable factor of employment.

Appellant alleged that he was given no meaningful work from June to mid September 2002 and was then assigned to manage "three dysfunctional teams." However, the Board has held that an employee's dislike of his job duties or the desire for a different position is not a compensable factor of employment.¹¹ The assignment of work tasks is an administrative function of the employer and is not considered to be within the performance of duty unless error or abuse is shown.¹² The Board has held that an administrative or personnel matter will be

⁵ 5 U.S.C. § 8102(a).

⁶ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁸ *Effie O. Morris*, 44 ECAB 470 (1993).

⁹ See *Norma L. Blank*, 43 ECAB 384 (1992); see *Barbara Bush*, 38 ECAB 710 (1987).

¹⁰ *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

¹¹ *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002); *Lillian Cutler*, *supra* note 6.

¹² *Hasty P. Foreman*, 54 ECAB ____ (Docket No. 02-723, issued February 27, 2003).

considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹³ In an August 28, 2003 letter, Mr. Kohut noted that, when appellant reported for duty, his physician recommended that he assume his new duties gradually to maintain a sense of control. Mr. Kohut stated that he gave appellant ample time to acclimate to the employing establishment's operations. He asserted that appellant did not complain that the adjustment process was too slow. In June 16, 2004 letters, Mr. Kohut and the employing establishment explained that he was given "great latitude in the performance of his duties" and in how quickly he assumed them due to his past work experience and bipolar disorder. The Board finds that the evidence of record reflects that, Mr. Kohut acted reasonably. Appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to his work assignments from June to September 2002.

Appellant also attributed his condition to being denied requested accommodations for his bipolar disorder, including working a compressed schedule, starting work 30 minutes later than scheduled and working at home one day a week. However, the assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.¹⁴ In August 28, 2003 and June 16, 2004 letters, Mr. Kohut explained that appellant, as a primary care manager, needed to be on site during business hours Monday through Friday and that a four-day schedule would adversely affect patient care. The Board finds that Mr. Kohut's explanation is reasonable and that no error or abuse was shown regarding appellant's work schedule. Appellant has not established a compensable factor of employment with regard to his work schedule.

Appellant expressed his frustration with Mr. Kohut's management style, in that he refused to provide supplemental feedback regarding his performance, denied his requests for additional support staff and to tape meetings and allegedly countermanded his instructions to his subordinates. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises supervisory discretion fall, as a rule, outside the coverage of the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties, that employees will at times dislike actions taken, but that mere disagreement or dislike of supervisory or management action will not be actionable, absent evidence of error or abuse.¹⁵ The Board finds that appellant's allegation regarding Mr. Kohut's conflicting instructions is too vague to constitute a compensable employment factor.¹⁶ Appellant did not describe any specific incidents in which Mr. Kohut countermanded him. The Board further finds that the denial of his requests to tape record meetings, for additional support staff and supplemental feedback were reasonable exercises of supervisory discretion. In an August 28, 2003 letter, Mr. Kohut asserted that appellant was a diligent manager who did not complain of any difficulty doing his job.

¹³ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹⁴ *Helen P. Allen*, 47 ECAB 141 (1995); *Peggy R. Lee*, 46 ECAB 527 (1995).

¹⁵ *Marguerite J. Toland*, 52 ECAB 294, 299 (2001).

¹⁶ See *Ruthie M. Evans*, *supra* note 7.

Therefore, he had not established a compensable employment factor with regard to these allegations.

Appellant also attributed his condition, in part, to alleged verbal altercations with supervisors and managers. He asserted that on three unspecified dates, a manager “barged” into his meetings and disrupted the proceedings for no reason. Appellant also alleged that Mr. Kohut yelled at him on three unspecified dates from October 2002 to April 2003. He also alleged that on April 9, 2003 a supervisor remarked that he wished the employing establishment had a “g-damn chief of staff who would do his job.” The Board has recognized the compensability of verbal and physical altercations under certain circumstances.¹⁷ This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁸ The Board will carefully review the factual circumstances of each case to make an independent determination of whether the evidence establishes a compensable factor of employment. In this case, appellant did not provide evidence corroborating any of the alleged verbal altercations as factual. Therefore, he has not established any of the alleged remarks as compensable factors of employment.¹⁹

Appellant also attributed his condition, in part, to alleged overwork. He asserted that he worked more than 40 hours a week, started work earlier than scheduled and that he had to take on additional responsibilities for a quality improvement program. The Board has held that overwork is a compensable factor of employment if appellant submits sufficient evidence to substantiate this allegation.²⁰ Also, in certain circumstances, working overtime is sufficiently related to regular or specially assigned duties to constitute a compensable employment factor.²¹ However, in this case, appellant did not submit sufficient evidence to corroborate his allegations of overwork or that he worked more than his scheduled 40-hour tour of duty. Therefore, he has not established a compensable factor in this regard.²²

¹⁷ See *Harriet J. Landry*, 47 ECAB 543 (1996); *Mary A. Sisneros*, 46 ECAB 155 (1995); *David W. Shirey*, 42 ECAB 783 (1991).

¹⁸ See *Frank B. Gwozdz*, 50 ECAB 434 (1999) (the evidence established that the employee’s supervisor asked if he had changed his name; held not to constitute verbal abuse or harassment); *Christophe Jolicœur*, 49 ECAB 553 (1998) (the employee alleged and a witness verified that his supervisor loudly asked why the employee was not looking for “damn” forms; held not to constitute verbal abuse within coverage of the Act); *Daniel B. Arroyo*, 48 ECAB 204 (1996) (evidence that the employee’s supervisor had used profanity in the workplace; held not to constitute a compensable factor of employment).

¹⁹ *Linda J. Edwards-Delgado*, 55 ECAB ____ (Docket No. 03-823, issued March 25, 2004).

²⁰ *Bobbie D. Daly*, 53 ECAB ____ (2002); *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996); *Chester R. Henderson*, 42 ECAB 352 (1991); *Manuel W. Vetti*, 33 ECAB 750 (1982). See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984) (the Board held that an unusually heavy workload is covered under the Act).

²¹ *Ezra D. Long*, 46 ECAB 791 (1995).

²² *Linda J. Edwards-Delgado*, *supra* note 19.

Appellant also alleged incidents of harassment and discrimination by Mr. Kohut. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.²³ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.²⁴ Appellant asserted that in an April 8, 2003 meeting, Mr. Kohut suggested to a superior that he could assist an injured employee applying for compensation benefits as he knew the system. In a June 16, 2004 letter, Mr. Kohut stated that at the April 8, 2003 meeting, it was mentioned that a staff member inquired about filing a compensation claim. He suggested that appellant “would be an appropriate mentor ... if they needed management help,” noting that the employee was one of appellant’s subordinates. Thus, he has established the April 8, 2003 incident as factual. However, Mr. Kohut explained that he merely suggested that appellant might be able to assist one of his subordinates. The Board finds that Mr. Kohut’s remark did not constitute verbal abuse, but was a routine element of an administrative discussion.²⁵

Similarly, appellant alleged that on April 10, 2003, Mr. Kohut called him “crazy,” compared him to an irate, mentally ill patient walking nearby and commented that he should give the patient some of his pills. This incident allegedly occurred in front of eight of his coworkers. In a June 16, 2004 letter, Mr. Kohut denied that he called appellant “crazy” or directed any comments to him during the April 10, 2003 incident with the irate patient. He asserted that he made a “general comment ... that this patient needed medications just as some of us do and that we took care of his need.” However, Mr. Kohut noted that as appellant’s facial expression indicated that he misinterpreted the comment, he subsequently apologized and explained his comment in order to correct appellant’s misperceptions. The Board finds that Mr. Kohut’s explanation of the April 10, 2003 incident is reasonable and establishes that his comments did not pertain to appellant. Appellant has not established an incident of harassment or discrimination with regard to Mr. Kohut’s remarks on April 10, 2003.²⁶

Appellant also attributed his condition, in part, to his removal from the home care director position on April 10, 2003 and reassignment to a nonmanagerial position. He asserted that the action was unfounded and occurred only six weeks before he would have been eligible for reinstatement at Grade 13, Step 9. In a July 16, 2004 letter, Mr. Kohut explained that he removed appellant from the director position on April 10, 2003 and offered him a nonmanagerial position to allow him more scheduling flexibility. The Board has held that disability is not compensable when it results from an employee’s frustration from not being permitted to hold a particular position.²⁷ Appellant’s reaction to his job status pertains to an administrative or personnel matter of the employer. Absent error or abuse, this administrative action is not

²³ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant’s allegations of unfair treatment to determine if the evidence corroborated such allegations).

²⁴ *Linda J. Edwards-Delgado*, *supra* note 19.

²⁵ See *Frank B. Gwozdz*, *supra* note 18.

²⁶ *Id.*

²⁷ *Lillian Cutler*, *supra* note 6.

considered a compensable factor of employment.²⁸ The Board finds that Mr. Kohut's explanation for appellant's removal was reasonable under the circumstances of the case, as the director's position would not allow him the flexible scheduling accommodations he had requested previously. Regarding his desire to be eligible for the Grade 13, Step 9 position, the Board has held that an employing establishment's denial of a promotion is not a compensable employment factor as it does not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute the desire to work in a different position.²⁹ Thus, he has not established his removal from the director's position or reassignment to a nonmanagerial position as compensable factors of employment as he has not established any error or abuse with regard to these administrative matters.

The Board finds that appellant did not establish any compensable employment factors under the Act. Therefore, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty. As he failed to establish a compensable factor of employment, it is not necessary to address the medical evidence in this case.³⁰

CONCLUSION

The Board finds that appellant did not establish that he sustained an emotional condition in the performance of duty as he failed to establish any compensable factors of employment.

²⁸ *Anne L. Livermore*, 46 ECAB 425 (1995).

²⁹ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

³⁰ *Garry M. Carlo*, 47 ECAB 299 (1996); *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 13, 2004 is affirmed.

Issued: April 25, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member