United States Department of Labor
Employees' Compensation Appeals Board

EUGENE A. CAVICCHI, Appellant	)	
and	)	**Docket No. 04-1591**
	)	**Issued: January 12, 2005**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Miami, FL, Employer	)	

Appearances:
Eugene A. Cavicchi, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 4, 2004 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated May 25 and January 30, 2004, which denied his emotional condition claim. 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 met his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of employment.

FACTUAL HISTORY

On April 4, 2002 appellant, then a 51-year-old senior customs inspector, working four hours per day[1] filed a Form CA-2, occupational disease claim alleging that he experienced

[1] The record indicates that appellant began working four hours per day in 1997, due to a nonemployment-related kidney condition.

management-induced stress. He indicated that he first became aware of his condition and its relationship to his employment on that day when he stopped work. Appellant alleged that he had been harassed since 1998 by Port Director Ruby Hogan and Chief Inspector Myra Quirk, and on April 4, 2002 he had been given a letter of reprimand resulting from an argument with his supervisor, Raymond F. Knopp, regarding his request to transfer to Boston.

In a statement dated May 13, 2002, appellant alleged that he had been harassed by Ms. Hogan and Ms. Quirk since 1998 when he began working part-time due to a kidney ailment. He applied for several promotions which he did not receive, stating that Ms. Hogan would not give him a recommendation. He filed an Equal Employment Opportunity (EEO) complaint based on age and gender discrimination and harassment. Appellant stated that the EEO Commission dismissed the case, but he had filed an appeal with the U.S. District Court and his case was going forward. He requested temporary transfers to Boston to care for his mother who was seriously ill but these were denied. Appellant admitted that he became angry with Mr. Knopp because his transfer requests were denied. He stated that he had no trouble taking leave under the Family Medical Leave Act (FMLA) until Ms. Quirk became the Chief Inspector. Appellant alleged that Ms. Hogan maintained that he submitted false medical evidence regarding his mother's illness and that in May 2000 Ms. Quirk called his mother's doctor to verify her condition and if leave was needed to care for her. He alleged that he had complained to Internal Affairs about personnel at a previous temporary assignment, the Vehicle Export Station. Internal Affairs conducted an investigation and he inappropriately became a subject of the investigation which, he alleged, was in retaliation for filing the EEO complaint. Appellant generally alleged that both Ms. Quirk and Ms. Hogan continued to harass him, including making snide remarks and not processing his requests in a timely manner.

Appellant submitted copies of his leave and temporary assignment requests, correspondence with the employing establishment including responses, a letter of reprimand signed by him on April 4, 2002, various emails, correspondence to the Office, including a "witness list" and letters dated March 27 and September 22, 2001 in which his brother John C. Cavicchi, who was serving as appellant's attorney, inquired about the Internal Affairs investigation and requested that he be temporarily assigned to Boston. Appellant submitted a copy of his EEO complaint, correspondence from the EEO Commission and the EEO order of dismissal dated May 7, 2001.

In an April 22, 2002 report, Dr. Daniel R. Collins, a psychiatrist, advised that appellant could not work from April 5 to May 13, 2002 due to a stress-induced mental disorder.

By decision dated June 13, 2002, the Office found that appellant failed to establish a compensable factor of employment.

On June 24, 2002 appellant requested a hearing and submitted additional evidence, including correspondence to Dr. Collins, additional emails, some with appended comments, Customs policies and two pages of a trial transcript. He also submitted an affidavit dated January 4, 2003, in which he reiterated his allegations regarding his leave and transfer requests and the internal affairs investigation, an affidavit from Mr. Cavicchi and correspondence with the EEO Commission.

In a medical report dated September 3, 2002, Dr. Ramdas Bhandari, a Board-certified orthopedic surgeon, advised that appellant could not work on September 3, 2002 but could return to light duty on September 4, 2002. He also referred appellant to a neurosurgeon.

Appellant further submitted a letter dated June 6, 2000, in which his attorney wrote the Commissioner of Customs, Raymond Kelly regarding the telephone call Ms. Quirk had made to his mother's physician and attached a copy of a letter dated May 18, 2000 from her physician, Dr. Stafford I. Cohen. By letter dated January 6, 2003, appellant's attorney requested that the Office consolidate his case 06-2068673 with the instant case, 06-2056539.

In a January 17, 2003 letter, appellant requested that his cases be consolidated and submitted subpoena requests for Ms. Hogan, Ms. Quirk, Edward Bowers and Kevin Mansfield. He also requested that the May 18, 2000 letter from Dr. Cohen be placed in the record.

By decision dated February 13, 2003, an Office hearing representative denied appellant's request for subpoenas as the request was not timely filed. She further noted that the May 18, 2000 letter from Dr. Cohen was contained in the case record. In a letter also dated February 13, 2003, the hearing representative advised appellant's attorney that there were no grounds for consolidating the cases as the second case was for a back injury.

At the hearing, held on February 27, 2003, appellant testified regarding his allegations." He submitted an affidavit in which David Mark Conrad opined that the Internal Affairs investigation was phony, an EEO selection register, a copy of a pleading filed in U.S. District Court, a May 9, 2000 FMLA leave request with appended notes from Ms. Quirk and Ms. Hogan and a May 5, 1999 letter from Dr. Cohen. He also submitted an undated deposition from Walter Biondi and comments regarding his 2000 request for FMLA leave.

In an August 29, 2002 deposition, Ms. Quirk acknowledged calling Dr. Cohen's office, stating that she was held accountable for approving leave requests and that appellant had not provided current documentation or an original letter from Dr. Cohen stating that he was needed in Boston to care for his mother. In a February 27, 2003 statement, Ms. Quirk again discussed the call to Dr. Cohen's office. She stated that the physician's secretary informed her that she had changed the date on the letter and suggested that Ms. Quirk talk with the doctor. Ms. Quirk stated that her conversations with the secretary and with Dr. Cohen were cordial and that after this conversation appellant's FMLA leave was granted. She stated that she later learned it was not appropriate for her to call the doctor's office.

By decision dated May 16, 2003, an Office hearing representative modified the June 13, 2002 decision to reflect that Ms. Quirk's telephone call to Dr. Cohen's office was an administrative error and constituted factor of employment. The hearing representative, however, found that the medical evidence did not establish that this factor caused appellant's emotional condition and denied the claim.

On August 1, 2003 appellant, through his attorney, requested reconsideration and submitted additional evidence, including work assignment sheets dating from May to October 1997, an Internal Affairs transcription of a conversation between appellant and Special Agent Leon Ives dated March 2001, an April 21, 2003 affidavit filed in U.S. District Court in

which Debra E. Herzog, a senior advisor to the Assistant Commissioner of Internal Affairs of the Bureau of Immigration and Customs Enforcement, advised that she was transmitting appellant's entire investigative file, which consisted of six pages. A five-page report of investigation dated October 1, 2002 was attached. An October 5, 1999 memorandum indicated that the Internal Affairs investigation had been favorably completed. In a July 7, 2003 affidavit, Mr. Conrad opined that the five-page report was not appellant's entire file. Also attached was his declaration in support of a motion for summary judgment in his EEO case. An undated "synopsis" of investigation noted that appellant was the subject of an investigation regarding exportation of vehicles.

In a July 28, 2003 report, Dr. Collins noted that appellant had been under his care since April 2002. He stated that appellant reported an "oppressive workplace" and advised that his condition had worsened two weeks previously when the physician advised him to stop work.

By decision dated January 30, 2004, the Office denied modification of the May 16, 2003 decision. On March 15, 2004 appellant requested reconsideration and submitted additional evidence.

In a December 14, 2003 report, Dr. Collins reported a history of a "pattern of punishment" at the employing establishment. He diagnosed an anxiety disorder, stating that appellant's "obsessing got worse and anger continued to build" due to "perceived injustices." The physician advised that appellant had no emotional problems "until a series of very upsetting events at work began to occur a few years ago," continuing that his anger and anxiety continued to increase to the point that he feared an attempt was going to be made on his life. He concluded that appellant's mental illness had a direct causal relationship to the "pattern of harassment" at work.

Appellant also submitted employing establishment memoranda and emails dated in November and December 2003, a December 8, 2003 letter to the employing establishment in which appellant's attorney discussed a transfer and a February 24, 2004 letter in which the employing establishment discussed an EEO claim.

In a letter dated April 16, 2004, Jose S. Ramirez, Port Director, discussed events that occurred from July 2003 to March 19, 2004 and attached a copy of a grievance filed on April 9, 2004 with no resolution recorded.

Appellant's attorney submitted a pleading which discussed Diane Gorges and Alice O'Donnell, employing establishment personnel and referred to events that occurred in 2003 and 2004.[2] Also submitted was the copy of a customer complaint against appellant and union correspondence regarding the grievance.

By decision dated May 25, 2004, the Office denied modification of the January 30, 2004 decision. The Office noted that the evidence submitted with appellant's reconsideration request referred to a second stress claim filed by him for events that occurred after the instant claim and that the report of Dr. Collins was insufficient to establish his claim.

[2] In 2003, appellant transferred to the Miami Free Trade Zone.

LEGAL PRECEDENT

To establish that he 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 his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[3] 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.[4]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[6] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[7] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[8]

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.[9] 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

[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

[4] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

[5] *Lillian Cutler*, 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Robert W. Johns*, 51 ECAB 137 (1999).

[8] *See Lillian Cutler*, *supra* note 5.

[9] *See Dennis J. Balogh*, *supra* note 4.

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[10]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee 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. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence[11]

ANALYSIS

In the instant case, appellant has alleged that his emotional condition was caused by the "insensitivity" of the employing establishment, when inappropriately given a letter of reprimand, not granted a promotion, the denial of his leave and his transfer requests and being the subject of an Internal Affairs investigation. He also noted that the employing establishment erred by calling his mother's physician and alleged a general pattern of harassment by the employing establishment management.

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act.[12] However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[13] An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor; or the manner in which a supervisor exercises his supervisory discretion;[14] or mere disagreement of supervisory or management action,[15] as a rule, fall outside the scope of coverage provided by the Act. The denial by the employing establishment of a request for a different job, promotion or transfer is an administrative decision which does not directly involve an employee's ability to perform work duties, but rather constitutes an employee's desire to work in a different position[16] and frustration from not being permitted to work in a particular environment is not compensable.[17] Reactions to disciplinary matters, such as a letter of reprimand also pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted

[10] *Id.*

[11] *James E. Norris*, 52 ECAB 93 (2000).

[12] *Roger Williams*, 52 ECAB 468 (2001).

[13] *Dennis J. Balogh, supra* note 4.

[14] *Margaret J. Toland*, 52 ECAB 294 (2001).

[15] *Christophe Jolicoeur*, 49 ECAB 553 (1998).

[16] *Ernest J. Malagrida*, 51 ECAB 287 (2000).

[17] *Roy E. Shotwell, Jr.*, 51 ECAB 656 (2000).

abusively.[18] As an investigation is generally related to the performance of an administrative function of the employer and not to the employee's regular or specially assigned work duties, it is not a compensable factor of employment unless there is affirmative evidence that the employer erred or acted abusively in the administration of the matter.[19]

In this case, appellant submitted insufficient evidence to establish that the employing establishment committed error and abuse regarding the above allegations. While appellant submitted several affidavits from Mr. Conrad, who generally asserted that the Internal Affairs investigation was inappropriate, he presented no specific facts regarding the investigation. There is nothing in the record to indicate that the employing establishment committed error or abuse regarding the investigation. Appellant acknowledged that the letter of reprimand was issued after he got angry with his supervisor, Mr. Knopp, because his transfer requests were denied. Thus, the record does not support that the employing establishment erred in issuing the letter.

While the handling of leave requests are generally related to employment, they are administrative functions of the employer and not duties of the employee.[20] Thus, absence error or abuse on the part of the employing establishment, such would not be a compensable factor of employment. There is no evidence to support that Ms. Quirk falsely accused appellant regarding Dr. Cohen's letter. Rather, she sought current documentation regarding his request for FMLA leave, an appropriate action on her part. The Board, however, agrees with the Office that she committed administrative error by calling Dr. Cohen's office. Appellant, therefore, established a compensable factor of employment in this matter.

Regarding appellant's general allegation that he was harassed due to the insensitivity of the employing establishment, the Board finds that he has submitted insufficient evidence to establish that he was harassed as alleged. An EEO complaint, by itself, does not establish that workplace harassment or unfair treatment occurred[21] and the only EEO decision of record is the order of dismissal dated May 7, 2001. The issue is not whether the claimant has established harassment or discrimination under EEO standards. Rather, the issue is whether the claimant has submitted sufficient evidence to establish a factual basis for the claim under the Act by supporting his or her allegations with probative and reliable evidence.[22] In this case, appellant has submitted no probative, reliable evidence to indicate that management at the employing establishment harassed him as alleged. The Board finds that he did not establish harassment on the part of the employing establishment.

As appellant has established a compensable factor of employment, the medical evidence must be analyzed.[23] The relevant medical evidence includes reports from appellant's attending

[18] *See Sherry L. McFall*, 51 ECAB 436 (2000).

[19] *Ernest S. Pierre*, 51 ECAB 623 (2000).

[20] *James P. Guinan*, 51 ECAB 604 (2000).

[21] *James E. Norris, supra* note 11.

[22] *Id.*

[23] *See Dennis J. Balogh, supra* note 4.

psychiatrist, Dr. Collins. In an April 22, 2002 report, he advised that appellant could not work from April 5 to May 13, 2002 due to a "stress-induced mental disorder." Dr. Collins did not indicate that appellant's inability to work was caused by the accepted compensable factor of employment. In a July 28, 2003 report, he advised that appellant reported an "oppressive workplace" and he advised him to stop work. Again, he did not provide an opinion explaining how appellant's condition was employment related. In a December 14, 2003 report, he stated that appellant provided a history of a "pattern of punishment" at the employing establishment. He diagnosed an anxiety disorder, stating that appellant's "obsessing got worse and anger continued to build" due to "perceived injustices." The physician advised that appellant had no emotional problems "until a series of very upsetting events at work began to occur a few years ago," continuing that appellant's anger and anxiety continued to increase to the point that he feared an attempt was going to be made on his life. He concluded that appellant's mental illness had a direct causal relationship to the "pattern of harassment" at work. The Board finds these reports insufficient to establish entitlement. While Dr. Collins advised that appellant's anxiety disorder was due to a pattern of harassment at work, as stated above, there is no evidence of record to establish that appellant was harassed. It is apparent that the physician accepted appellant's various allegations and complaints as factual. Dr. Collins did not mention the accepted compensable factor of Ms. Quirk contacting the physician treating appellant's mother or explain how this factor caused or contributed to the diagnosed condition. The Board, therefore, finds that Dr. Collins' reports are too general in nature to meet appellant's burden.

The Board had long held that medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relationship.[24] Appellant has the burden of proof to establish that the conditions for which he claims compensation were caused or adversely affected by his federal employment.[25] Part of this burden includes the necessity of presenting rationalized medical evidence, based on a complete factual and medical background, establishing a causal relationship. An award of compensation may not be based upon surmise, conjecture or upon appellant's belief that there is a relationship between his medical conditions and his employment. The Board finds that appellant has not submitted sufficient probative medical evidence and, therefore, failed to discharge his burden of proof.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an employment-related emotional condition causally related to the accepted employment factor.

[24] *Albert C. Brown*, 52 ECAB 152 (2000); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[25] *See Calvin E. King*, 51 ECAB 394 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs May 25 and January 30, 2004 be affirmed.

Issued: January 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member