



## **FACTUAL HISTORY**

On August 25, 2001 appellant, then a 33-year-old customs inspector, filed an occupational disease claim alleging that on August 23, 2001 he was harassed by his supervisor because of his physical disability.<sup>1</sup>

In a report dated October 9, 2000, Dr. Robert J. Moffat, an attending Board-certified internist, indicated that he could return to duty following his motorcycle accident but should not work overtime for more than two hours a day, four times a week and was limited to 10 hours a day in order to reduce the fatigue caused by wearing a prosthetic limb.

In an undated statement received by the Office on August 29, 2001, Robert Hood indicated that he attended an August 23, 2001 meeting scheduled by Nancy Parlato, the Branch Chief. He indicated that the meeting concerned appellant's requests for a handicapped parking space and for outside employment and his physician's recommendations for footwear and socks.<sup>2</sup> Mr. Hood stated that appellant withdrew his request for a handicapped parking space upon being informed of the availability of two handicapped spaces and agreed to change his outside employment request from one listing multiple types of employment to individual requests addressing just one type of job per request. He indicated that Chief Parlato requested clarification from appellant's physician regarding the necessity for wearing white socks as athletic shoes with white-stripping were not acceptable under the employing establishment's uniform policy. The meeting concluded with the parking issue resolved, appellant's request to speak to a superior official regarding uniform standards and his request that Chief Parlato put in writing her request for a physician's clarification of the need for white socks.

In a September 5, 2001 report, Dr. Jeffrey Matloff, Ph.D., a licensed clinical psychologist, stated that appellant needed to take leave from work for two weeks due to anxiety and stress.

In statements dated October 5 and 11, 2001, Chief Parlato noted that, at the August 23, 2001 meeting, the handicapped parking space issue was resolved when she reminded appellant of two available handicapped spaces. The issue of outside employment was addressed with his agreement to file a single request for each type of job to expedite the review process. She noted that the uniform policy required solid black shoes with dark socks but appellant wore white-stripped black athletic shoes with white socks. Chief Parlato advised that a black sock with white soles was available from a uniform catalog and she asked him to obtain an all-black athletic shoe.<sup>3</sup> Chief Parlato stated that she would forward appellant's request to speak to another official about his footwear and gave him additional time to provide a note from his physician

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<sup>1</sup> At the hearing held in this case, appellant indicated that following one 16-hour shift in January 2000, he fell asleep while driving home on his motorcycle and was injured when it struck a guard rail, resulting in the amputation of his right leg.

<sup>2</sup> Appellant's physician recommended that appellant wear soft-soled athletic shoes and white cotton socks due to his leg amputation and his allergy to socks that were not made of 100 percent cotton.

<sup>3</sup> Appellant had previously advised that he would be able to find black athletic shoes without white stripes.

clarifying his footwear requirements. Chief Parlato noted that appellant's job included mandatory overtime but was limited to two hours a day based on his medical restrictions.

By decision dated October 25, 2001, the Office denied appellant's emotional condition claim on the grounds that the evidence did not establish a compensable factor of employment.

On November 15, 2001 appellant requested a hearing that was held on March 25, 2002. He stated that he was required to work overtime, sometimes for up to 16 hours. He described his job as dangerous, because he sometimes had to apprehend armed individuals and had been physically assaulted. Appellant alleged that his emotional condition was also due to the requirement that he have extensive knowledge of the laws and regulations of 40 different agencies, to strenuous physical demands, such as lifting heavy objects, and to his belief that the employing establishment wanted to terminate his employment because he had a prosthetic leg. He alleged that the employing establishment denied his request for a handicapped parking space, denied his request for outside employment and did not want him to wear the athletic shoes and cotton socks specified by his physician.<sup>4</sup> He alleged that he was not allowed to wear the walking shorts uniform.<sup>5</sup>

In a December 5, 2001 report Dr. Warren Gershwin, a psychiatrist, stated that appellant's stress condition was caused by his supervisors, who harassed and discriminated against him because of his disability.

In response to appellant's testimony, Rex L. Applegate, assistant director for mission support, stated that on August 23, 2001 appellant was asked to provide within 12 days medical documentation regarding his need to wear white socks; but he never complied with the request. Appellant submitted a request for outside employment with nine jobs listed but he never provided a description of the duties, locations or hours, as required. Therefore, the employing establishment did not make a decision on his request.

Appellant submitted statements from several witnesses who explained how overtime work adversely affected their safety. Appellant also submitted published articles on the relationship between sleep deprivation and overtime work to employee safety.

By decision dated June 18, 2002, the Office hearing representative found two possible compensable factors of employment, appellant's mandatory overtime and his concern for his personal safety.<sup>6</sup> However, he found that appellant did not provide specific examples of instances when his safety was threatened. The Office hearing representative further found that the medical evidence did not establish that appellant's emotional condition was caused by working mandatory overtime. He denied appellant's claim on the grounds that he did not establish that his emotional condition was caused by a compensable factor of employment.

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<sup>4</sup> He stated that on August 23, 2001 he was asked to provide clarification of his physician's note directing him to wear tennis shoes and cotton socks within 10 days or face disciplinary action.

<sup>5</sup> Appellant alleged that he was required to wear long pants to hide his prosthetic leg.

<sup>6</sup> The Office hearing representative noted that these two factors were not the initial factors cited when appellant filed his claim.

On June 9, 2003 appellant requested reconsideration and submitted reports dated from November 14, 2001 to May 23, 2003 in which Dr. Gershwin stated that his condition was caused by harassment and undue stress by management and that appellant had been disabled since August 2001. Dr. Gershwin stated:

“I have reviewed the testimony given at [appellant’s] hearing.... In my medical opinion, I believe the extensive mandatory overtime that [appellant] worked ... from 1997 until 2001 and the inherent dangers associated with his job duties as discussed at his hearing that [were] supported by witness statements contributed heavily to his disabling psychological conditions.”

In reports dated June 8 and 15, 2001, Dr. Judith A. Saalinger, Ph.D., a licensed clinical psychologist, stated that appellant was experiencing symptoms from a post-traumatic stress disorder sustained during the gulf war, which were aggravated by his work at the employing establishment. She indicated that certain aspects of his job triggered memories of his military experience.

In a report dated May 25, 2003, Michael Gilliland, appellant’s team leader, described how working overtime adversely affected appellant and expressed his opinion that certain individuals at the employing establishment did not want him to return to work after his motorcycle accident and leg amputation.

In a May 30, 2003 statement, Lena E. Parker, a supervisor, stated that appellant generally worked the more dangerous night shift at the border crossing and individuals had attempted to punch and shoot him and strike him with their vehicles.

By decision dated September 11, 2003, the Office denied appellant’s claim on the grounds that the medical evidence did not establish that his emotional condition was caused by his mandatory overtime.

On March 1, 2004 appellant requested reconsideration. He submitted evidence previously of record and considered by the Office.

By decision dated June 15, 2004, the Office denied appellant’s request for reconsideration on the grounds that the evidence did not warrant further merit review of the claim.

### **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees’ Compensation Act<sup>7</sup> provides for the payment of compensation benefits for injuries sustained in the performance of duty. To establish his claim 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

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<sup>7</sup> 5 U.S.C. §§ 8101-8193.

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>8</sup>

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*,<sup>9</sup> the Board explained that there are distinctions in the type of employment situations giving rise to a compensable emotional condition under the Act. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>10</sup> 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 an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.<sup>11</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>12</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>13</sup>

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 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>14</sup> Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.<sup>15</sup>

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<sup>8</sup> *George C. Clark*, 56 ECAB \_\_\_ (Docket No. 04-1572, issued November 30, 2004).

<sup>9</sup> 28 ECAB 125 (1976).

<sup>10</sup> *George C. Clark*, *supra* note 8.

<sup>11</sup> *Lillian Cutler*, *supra* note 9.

<sup>12</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

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

<sup>14</sup> *Lillian Cutler*, *supra* note 9.

<sup>15</sup> *Michael L. Malone*, 46 ECAB 957 (1995).

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.<sup>16</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that he was required to have extensive knowledge of the laws and regulations of 40 different agencies, to perform strenuous physical activities, such as lifting heavy objects; was not provided with a handicapped parking space following his motorcycle accident; a request for outside employment was denied and that management harassed him regarding his prosthetic leg and about uniform regulations.

Appellant alleged that he was required to be familiar with the laws and regulations of 40 different agencies and perform physical activities, such as lifting heavy objects. While these allegations pertain to *Cutler*, if established; the Board finds that he did not submit specific information pertaining to these allegations. His allegations are too general and do not constitute a compensable factor of employment.

Regarding the handicapped parking space allegation, Chief Parlato stated that the issue was resolved at the August 23, 2001 meeting when she reminded appellant of two available handicapped spaces. As no error or abuse on the part of the employing establishment has been established, this administrative matter is not deemed a compensable factor of employment.

Regarding appellant's request for outside employment, Chief Parlato indicated that this issue was resolved at the August 23, 2001 meeting through his agreement to file a single request for each type of outside job to expedite the review process. Mr. Applegate noted that appellant submitted a single request for outside employment listing nine different jobs but failed to provide a description of the duties, locations or hours, as required. Therefore, the employing establishment did not make a decision on his request. As no error or abuse on the part of the employing establishment has been established, this administrative matter is not deemed a compensable factor of employment.

Appellant alleged that he was harassed regarding his footwear and was not allowed to wear the walking shorts uniform because of his prosthetic leg. He also alleged that the employing establishment wanted to terminate his job because he had a prosthetic leg. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.<sup>17</sup> However, for harassment and 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.<sup>18</sup> Although, Mr. Gilliland expressed his opinion that certain individuals at the employing establishment did not want appellant to return

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<sup>16</sup> *Charles D. Edwards*, 55 ECAB \_\_\_ (Docket No. 02-1956, issued January 15, 2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Donna J. DiBernardo*, 47 ECAB 700 (1996).

to work after his motorcycle accident and leg amputation, there is insufficient evidence that the individuals at the employing establishment harassed appellant. Appellant's belief that he might be terminated because he had a prosthesis is a perception not supported by the evidence of record. Therefore, this allegation is not deemed a compensable factor of employment.

Regarding appellant's footwear, Chief Parlato noted that the uniform policy required solid black shoes with dark socks and appellant wore white-striped black athletic shoes with white socks. She advised that a black sock with white soles was available from a uniform catalog and she asked him to obtain an all-black athletic shoe. Management requested that appellant seek clarification from his physician concerning the necessity for all-white cotton socks but he never complied with the request. Mr. Applegate noted that on August 23, 2001 appellant was asked to provide medical documentation regarding his need to wear white socks within 12 days but he did not respond. Appellant has provided insufficient evidence to establish that he was harassed regarding his footwear. Therefore, this allegation is not deemed a compensable factor of employment

Appellant stated that his job was dangerous and he had been physically assaulted while apprehending armed individuals. Ms. Parker stated that appellant generally worked the more dangerous night shift at the border crossing and individuals had physically assaulted him. However, appellant did not provide specific details of incidents contributing to his emotional condition such as dates, locations, individuals involved and what occurred. Therefore, this general allegation cannot be deemed a compensable factor of employment.

Appellant also alleged that his emotional condition was caused by working mandatory overtime, sometimes up to 16 hours. The record reflects that appellant was required to work overtime in his position. Because overtime was a regular or special job requirement for appellant, it constitutes a compensable factor of employment. However, appellant's burden of proof is not discharged by the fact that he has established an employment factor. He must submit rationalized medical evidence establishing that his claimed emotional condition is causally related to an accepted compensable employment factor.<sup>19</sup>

In a report dated October 9, 2000, Dr. Moffat indicated that appellant could return to duty following his motorcycle accident but should not work overtime for more than two hours a day. However, he did not address whether appellant's emotional condition was causally related to working overtime. Therefore, this medical report does not establish that appellant's emotional condition was causally related to his mandatory overtime.

In reports dated June 8 and 15, 2001, Dr. Saalinger stated that appellant was experiencing symptoms from his post-traumatic stress disorder sustained during the gulf war. However, because she did not provide medical rationale explaining how his emotional condition was aggravated by the mandatory overtime requirement. Therefore, her reports do not discharge appellant's burden of proof.

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<sup>19</sup> *Brian E. Flescher*, 40 ECAB 532 (1989); *Ronald K. White*, 37 ECAB 176 (1985).

In a September 5, 2001 report, Dr. Matloff stated that appellant needed to take leave from work for two weeks due to anxiety and stress. However, he did not mention any specific work factors. Therefore, his report does not establish causal relationship between appellant's emotional condition and his mandatory overtime.

Dr. Gershwin stated that appellant's condition was caused by harassment and undue stress from management and he had been disabled since August 2001. Dr. Gershwin stated:

"I have reviewed the testimony given at [appellant's] hearing.... In my medical opinion, I believe the extensive mandatory overtime that [appellant] worked ... from 1997 until 2001 and the inherent dangers associated with his job duties as discussed at his hearing that [were] supported by witness statements contributed heavily to his disabling psychological conditions."

Dr. Gershwin did not provide medical rationale in support stated of his conclusion regarding how the mandatory overtime request contributed to appellant's emotional condition. His opinion is not based on a complete and accurate factual background as he did not mention appellant's preexisting post-traumatic stress disorder. Due to these deficiencies, Dr. Gershwin's reports are not sufficient to establish that appellant's emotional condition was causally related to his mandatory overtime.

Appellant submitted published articles on the relationship of sleep deprivation and overtime work to employee safety. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.<sup>20</sup>

As appellant failed to establish that his emotional condition claim was causally related to a compensable factor of employment, the Office properly denied his claim.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation on her own motion or on application. The Secretary, in accordance with the facts on review, may end, decrease, or increase the compensation previously awarded; or award compensation previously refused or discontinued.<sup>21</sup>

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.<sup>22</sup> To be

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<sup>20</sup> *William C. Bush*, 40 ECAB 1064 (1989).

<sup>21</sup> 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.606(b)(2).

entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.<sup>23</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reviewing the merits of the claim.<sup>24</sup>

### **ANALYSIS -- ISSUE 2**

In support of his reconsideration request, appellant submitted only evidence that had previously been submitted to the Office. Consequently, this evidence does not constitute relevant and pertinent evidence not previously considered by the Office. As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office, but properly denied his request for reconsideration.

### **CONCLUSION**

The Board finds that appellant failed to establish that he sustained an emotional condition causally related to a compensable factor of employment. The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>23</sup> 20 C.F.R. § 10.607(a).

<sup>24</sup> 20 C.F.R. § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 15, 2004 and September 11, 2003 are affirmed.

Issued: June 2, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member