

United States Department of Labor
Employees' Compensation Appeals Board

ERNEST L. NICHOLSON, Appellant

and

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Cleveland, OH, Employer

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Docket No. 05-26
Issued: March 1, 2005

Appearances:
John P. Lutsek, Esq., 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 27, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 1, 2004 denying his claim that he sustained an employment-related emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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.

FACTUAL HISTORY

On April 28, 2003 appellant, then a 51-year-old air traffic control specialist, filed an occupational disease claim alleging that he sustained an emotional condition due to "ongoing harassment and disparate treatment by supervisor." Appellant stopped work on April 26, 2003.

By letter dated June 25, 2003, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

The record was supplemented to include a statement of appellant's supervisor, John Callahan,¹ who noted that appellant had been training in a radar position since September 2002 and had completed 138 of 180 hours of training. He indicated that appellant's performance was inconsistent and that instructors still had to intervene and advise him of air traffic that needed to be separated. Mr. Callahan asserted that during training on April 15 and 22, 2003 appellant failed to properly notice oncoming air traffic on several occasions. He indicated that on April 22, 2003 he advised appellant of these problems and told him that he could not be certified until they were resolved. Mr. Callahan indicated that appellant told him that he thought his performance was acceptable and noted that he became frustrated and left his office.

By decision dated September 12, 2003, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors.

Appellant requested a hearing before an Office hearing representative which was held on May 19, 2004. On the day of the hearing, he submitted a May 15, 2003 statement in which he discussed the incidents and conditions which he believed caused him to sustain an emotional condition. Appellant asserted that, after he completed center radar training in September 2002, he requested but did not receive a training plan from his new supervisor, Mr. Callahan. He suggested that in November 2002 Mr. Callahan improperly directed him to annotate training reports, a task which he felt was a duty of the training instructors. Appellant indicated that he got the impression that Mr. Callahan felt it was a waste of time to train him because he was close to retirement and asserted that Mr. Callahan treated him with "indifference." He claimed that in a meeting on March 30, 2003 Mr. Callahan spent approximately 45 minutes unfairly belittling every aspect of his job performance without providing any plan for improving his work. Appellant claimed that he did not get a chance to complete his certification in April 2003 and noted that he could only surmise that Mr. Callahan had advised the other supervisors not to certify him. He indicated that on April 14, 2003 Mr. Callahan advised him that four or five other instructors wanted to observe his skills before approving certification and he asserted that this represented a highly unusual requirement for certification. Appellant indicated that after a training session on April 21, 2003 Mr. Callahan again subjected him to approximately 45 minutes of "critiquing and Monday morning quarterbacking" and belittled and harangued everything he had done. He asserted that the next day Mr. Callahan berated his performance in front of numerous air traffic controllers and other staff members. Appellant claimed that he became frustrated after Mr. Callahan brought him to his office and continued to unfairly critique his performance for another 10 minutes.

At the hearing, appellant provided testimony which was similar to that contained in his May 15, 2003 statement. He claimed that on several occasions Mr. Callahan made improper

¹ The initial copy of this statement in the record was unsigned and undated, but another copy signed by Mr. Callahan on May 14, 2003 was later added to the record. The record also contains an April 25, 2003 statement of Mr. Callahan which provides a similar account of the events of April 2003.

statements about his age and eligibility for retirement. Appellant asserted that Mr. Callahan constantly “nitpicked” his techniques for directing air traffic.²

The record was supplemented to include a June 24, 2004 statement of Gary Klingler, another supervisor, who asserted that Mr. Callahan acknowledged when appellant’s performance met the relevant standards, but noted that his performance was substandard on a number of occasions, including instances on April 15 and 22, 2003 when he failed to notice oncoming air traffic in a timely fashion. Mr. Klingler stated that Mr. Callahan periodically counseled appellant regarding his need to improve his work performance and indicated that Mr. Callahan gave appellant his training plan in a timely fashion. He asserted that he never heard Mr. Callahan talk about appellant’s age or otherwise subject him to harassment or discrimination. The record also contains numerous documents concerning appellant’s work performance which indicate that appellant met standards on some occasions but also made a number of operational errors during his training.

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 duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.³ 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.⁴

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.⁵ 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.⁶

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

² Appellant indicated that he filed an Equal Employment Opportunity (EEO) claim regarding the employing establishment’s actions, but the record does not contain any documents concerning such a claim.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁷ 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.⁸

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated September 12, 2003, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors and, by decision dated and finalized September 1, 2004, an Office hearing representative affirmed the Office's September 12, 2003 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that his supervisor, Mr. Callahan, subjected him to harassment and discrimination. He asserted that he got the impression that Mr. Callahan felt it was a waste of time to train him because he was close to retirement and claimed that Mr. Callahan treated him with "indifference." Appellant alleged that during meetings on March 30 and April 21, 2003 Mr. Callahan spent approximately 45 minutes unfairly belittling and haranguing every aspect of his job performance without providing any plan for improving his work. He claimed that on April 22, 2003 Mr. Callahan berated his performance in front of numerous air traffic controllers and other staff members and then brought him to his office and continued to unfairly critique his performance for another 10 minutes. Appellant also alleged that Mr. Callahan made improper statements about his age and eligibility for retirement.

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.⁹ 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 of harassment or discrimination are not compensable under the Act.¹⁰

In the present case, Mr. Callahan and Mr. Klingler, another supervisor, denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against.¹¹ Appellant

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁸ *Id.*

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

alleged that Mr. Callahan made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹² Both Mr. Callahan and Mr. Klingler noted that appellant had numerous problems with his job performance. The record supports that appellant was counseled about these problems, but there is no indication that it was done in a harassing or discriminatory manner. Appellant indicated that he filed an EEO claim regarding the employing establishment's actions, but the record does not contain any documents concerning such a claim. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant claimed that he never received a training plan from Mr. Callahan and that in November 2002 Mr. Callahan improperly directed him to annotate training reports, a task which he felt was a duty of the training instructors. He also suggested that he was not given an adequate chance to complete his certification in April 2003. Appellant also claimed that the employing establishment did not properly handle disciplinary actions and performance evaluations.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, and improperly handled his training, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹³ Although the handling of disciplinary actions and evaluations and the management of training are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹⁴ However, the Board has also found that 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵

Appellant did not submit any evidence showing that the employing establishment committed error or abuse with respect to training, disciplinary actions or performance evaluations. The record contains testimony of Mr. Callahan and Mr. Klingler which provides details of how the employing establishment handled these matters, but there is no indication that the employing establishment committed any wrongdoing.¹⁶ As noted above, appellant indicated that he filed an EEO claim regarding some of these matters, but the record does not contain any

¹² See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹³ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁴ *Id.*

¹⁵ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁶ For example, Mr. Klingler testified that appellant received a training plan and was given adequate opportunity to be certified.

documents concerning such a claim. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁷

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider any medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992). It should be noted that appellant did not submit any medical evidence in support of his claim.