

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

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CHARLES W. BLACKWELL, Appellant )

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and )

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DEPARTMENT OF VETERANS AFFAIRS, )

VETERANS ADMINISTRATION MEDICAL )

CENTER, Denver, CO, Employer )

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**Docket No. 05-366**

**Issued: March 2, 2005**

*Appearances:*

Charles W. Blackwell, *pro se*

Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On November 30, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 15, 2004, in which the Office denied his claim that he sustained an emotional condition in the performance of duty. 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 August 12, 2003 appellant, a 58-year-old former nurse, who had worked as director of patient and family health education, filed a Form CA-1, traumatic injury claim alleging that working in a dirty environment during the period 1999 to 2001 led to increased anxiety and post-traumatic stress disorder to the point of hypomania and bipolar disorder. An employing

establishment supervisor, Judy Schriver, workers' compensation and ergonomics program manager, advised that appellant had a previously denied claim and that he stopped work on January 23, 2002.<sup>1</sup> In a statement dated August 12, 2003, appellant stated that he would see dirty conditions from time to time during his three-year employment at the employing establishment and that he would report these conditions to employing establishment management. He further stated that an outside consulting service had evaluated the hospital and found it unclean/unsafe, that an in-house evaluation was scored less than passing, but noted that the Joint Commission of Accreditation of Healthcare Facilities gave the hospital a great score. He stated that a police report should be on file.

In a letter dated October 17, 2003, Ms. Schriver advised that the employing establishment was controverting the claim, noting that appellant had been terminated on January 23, 2003. By letter dated November 7, 2003, the Office notified appellant that it was adjudicating his claim as one for an occupational disease and advised him of the evidence needed to support his claim.

In a letter dated November 19, 2003, Ms. Schriver advised that this claim was essentially a duplicate claim and contradicted appellant's assertion that the employing establishment was unclean, stating that the Joint Commission of Accreditation of Healthcare Facilities fully accredited the facility. She stated that outside consultants were hired to review processes for keeping the hospital clean and safe.

By letter dated November 24, 2003, appellant stated that on his first day of work at the employing establishment, Jessie Standard told him, "I've heard about you, you are a smart one, we have to watch you" and told him that he could quit after he complained about the employing establishment. He stated that the chief of police for the hospital, John Heikka, told him that he belonged in the psychiatric ward, that Douglas Blankenship, director of new employee orientation told him that "no on[e] blows the whistle and survives the VA [Veterans Administration]", that he would be laughed at by staff for wearing a white hospital coat, that when teaching an ethics class he was told by an employing establishment staff member that "the VA has no ethics," that when he completed a review and update of the patient handbook, a medical staff member wrote on the computer network that the notebooks should be burned. Appellant stated that he was forbidden by his supervisor, Jan Kemp, from attending the session on nurses when the Joint Commission of Accreditation of Healthcare Facilities visited and that, when he advised Ms. Kemp that he could not work in an unclean environment, he was told to go home and that upon his return was reassigned to the library to shelve books. Appellant stated that at a meeting with employing establishment management regarding patient safety he was belittled and then escorted from the building and told to go home. He stated that he would report the many areas of the hospital that he felt were unkempt and unclean. Appellant stated that the responsibilities of the position of director of patient and family health education were "too much" and that the "vast responsibilities of the job" aggravated his existing post-traumatic stress

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<sup>1</sup> The record indicates that appellant's previous claim was adjudicated under Office file number 120163550. The instant claim was adjudicated under file number 122020201. The record in the instant case contains evidence from the prior case file including a merit decision dated June 25, 2003 which found that appellant failed to establish that he sustained a recurrence of disability beginning January 11, 2002 for his accepted aggravation of post-traumatic stress disorder and aggravation of dysthymia caused by employment factors in and around the 1989 San Francisco earthquake.

disorder and underlying bipolar disorder. He disagreed with Ms. Schriver's description of the outside consulting service, stating it was a full-scale "mock" Joint Commission of Accreditation of Healthcare Facilities inspection. Appellant attached a copy of a performance appraisal for the period April 11, 2000 to April 11, 2001 which includes handwritten marginalia, apparently by appellant, stating, "too much work; I was alon[e] responsible for thousands and thousands of patient's education; I was overworked!! New work 30-50 chart review." Appellant also submitted a position description for Director of Patient/Family Health Education.

The medical evidence submitted including treatment notes dating from December 18, 1998 to October 21, 2003, in which Dr. Phillip W. Ballard, Board-certified in family medicine and psychiatry, diagnosed post-traumatic stress disorder.<sup>2</sup> In reports dated December 31, 2002 and December 8, 2003, Dr. William L. Ingram, an attending Board-certified psychiatrist, diagnosed bipolar disorder, recurrent, and post-traumatic stress disorder and advised that employment factors aggravated these conditions.

By decision dated April 5, 2004, the Office denied the claim, finding it a duplicate of file number 120163550. On April 12, 2004 appellant requested a hearing and in a June 11, 2004 letter, advised the Office that the instant claim was for a hostile work environment and employee abuse and not for a dirty and unsafe work environment.

In a decision dated September 8, 2004, an Office hearing representative remanded the case to the Office for further development. The hearing representative determined that this case was not an attempt to relitigate file number 120163550, because the prior case was based on employment exposure during the period 1989 to 1992, where this claim was for exposure from April 12, 1999 to January 23, 2002 and remanded the case for further development regarding appellant's claimed exposure to unsafe and unclean conditions, an extended commute and a hostile work environment and/or employee abuse during this period. The hearing representative stated that the claimant should be asked to identify all employment factors he believed caused or contributed to this claim.

By letter dated October 13, 2004, the Office requested that appellant review the September 8, 2004 decision of the hearing representative and provide a statement identifying employment factors experienced during the period April 12, 1999 through January 23, 2002, which he believed caused his condition. He was also requested to submit an updated medical report. In letters dated October 8 and 23, 2004, appellant informed the Office that it had everything needed to render a decision. He also submitted a form report dated October 22, 2004, in which Dr. Ballard diagnosed chronic post-traumatic stress disorder and dysthymia and advised that appellant was unable to work as a nurse, opining that his condition was exacerbated by a hostile work environment that led to his being totally disabled.

In a decision dated November 15, 2004, the Office denied the claim, finding that appellant failed to establish that he sustained an emotional condition in the performance of duty.

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<sup>2</sup> These notes are in part illegible. Additional medical evidence submitted included 2 pages of a 12 page report prepared by Dr. Gary S. Gutterman, illegible form reports and laboratory results and medication records.

## LEGAL PRECEDENT

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 contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>3</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>4</sup> 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. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>5</sup> When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an 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 the work.<sup>6</sup>

In emotional conditions claims, 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. 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>7</sup>

For harassment or discrimination to give rise to a compensable disability under the Act, 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. Rather, the issue is

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<sup>3</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>4</sup> 28 ECAB 125 (1976).

<sup>5</sup> *See Robert W. Johns*, 51 ECAB 137 (1999).

<sup>6</sup> *Lillian Cutler*, *supra* note 4.

<sup>7</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>8</sup>

### ANALYSIS

Regarding appellant's allegations that the employing establishment was unclean and unsafe and that these conditions contributed to his emotional condition, he has submitted nothing to substantiate that these conditions existed. In his several statements appellant alleged that he witnessed and a consultant found unclean conditions, but he did not include a copy of this report. Ms. Schriver described the process of Joint Commission of Accreditation of Healthcare Facilities review and appellant acknowledged that the employing establishment successfully passed a Joint Commission of Accreditation of Healthcare Facilities review. Where a claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.<sup>9</sup> In this case, appellant did not provide substantiation that he was forced to work in an unclean environment. He, therefore, failed to establish that this was a compensable factor of employment.<sup>10</sup>

Appellant also generally contended that he was overworked in that his job description contained too many duties. The Board has held that overwork, as substantiated by sufficient factual information to support the claimant's account of events, may be a compensable factor of employment.<sup>11</sup> Here, however, appellant merely made a very general allegation that overwork caused his stress and a certain amount of specificity is necessary to establish the factual basis of appellant's claim.<sup>12</sup> He did not provide sufficient evidence to document the alleged overwork and, consequently, this allegation was not established by the evidence.<sup>13</sup>

Appellant also alleged that he worked in a hostile environment and described a number of incidents that he perceived as harassment. The Board, however, finds that his mere charges without further explanation or corroboration are insufficient to establish that any harassment did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act<sup>14</sup> and 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.<sup>15</sup> In the case at hand, appellant submitted nothing to substantiate that any of the alleged incidents did in fact occur. Thus, as

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<sup>8</sup> *James E. Norris*, 52 ECAB 93 (2000).

<sup>9</sup> *Michael A. Salvato*, 53 ECAB 666 (2002).

<sup>10</sup> *Dennis J. Balogh*, *supra* note 7.

<sup>11</sup> *Bobbie D. Daly*, 53 ECAB 691 (2002).

<sup>12</sup> *See Linda K. Cela*, 52 ECAB 288 (2001).

<sup>13</sup> *See Bonnie Goodman*, 50 ECAB 139 (1998).

<sup>14</sup> *James E. Norris*, *supra* note 8.

<sup>15</sup> *Id.*

appellant submitted no evidence to verify that these incidents occurred, these allegations constitute a mere perception and are, therefore, insufficient to establish his claim for an employment-related emotional condition.<sup>16</sup>

**CONCLUSION**

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 15, 2004 be affirmed.

Issued: March 2, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>16</sup> See *Barbara J. Latham*, 53 ECAB 316 (2002).