

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

JOHN A. MOORE, Appellant)
and) Docket No. 06-202
U.S. POSTAL SERVICE, MIDTOWN STATION,) Issued: April 19, 2006
Mobile, AL, Employer)

)

Appearances:
John A. Moore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 3, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated February 10 and October 11, 2005 denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the 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 22, 2004 appellant, a 70-year-old customer service manager, filed an occupational disease claim alleging that he sustained an emotional condition due to factors of his federal employment. Appellant alleged that he was demoralized by unfair treatment at the employing establishment for more than four years and that he experienced job-related stress, depression and peptic ulcer disease. He first became aware that his illness was job related on

April 20, 1999; that his regular hours were 8:00 a.m. to 5:00 p.m.; and that he first reported his condition to his supervisor on April 23, 2004.

An April 30, 1999 occupational disease claim¹ had been accepted for acute post-traumatic stress. On June 1, 1999 Ica Bell of the employing establishment offered accommodations to appellant, including that he be excused from attending weekly staff meetings or any other meetings that would cause him to come in contact with James Salter, postmaster. By letter dated August 23, 1999, appellant's therapist, Dr. Daniel L. Koch, a licensed clinical psychologist, recommended that appellant return to work with the limited-duty accommodations outlined in Ms. Bell's June 1, 1999 letter. In an attending physician's report dated March 23, 2000, Dr. Koch provided restrictions including "40 hours per week; no administrative meetings." On June 3, 2002 Ms. Bell notified appellant that he had been involuntarily reassigned for operational needs to the mobile processing and distribution center. Ms. Bell stated that appellant's inability to interact with Mr. Salter could no longer be considered a temporary condition and that the efficiency of the Midtown Station was being compromised.

In a letter dated April 1, 2004, Dr. Koch stated that appellant was compelled to stop working on February 20, 2004, due to a violation on the part of the employing establishment of the 1999 limited-duty agreement.

On March 1, 2004 the Office issued a notice of proposed removal for unsatisfactory work performance, specifying failure to attend staff meetings and teleconferences from October 22, 2003 to February 23, 2004 and failure to properly perform duties of station manager. On April 5, 2004 the Office issued a letter of decision removing appellant from the Postal Service effective April 6, 2004.

Appellant submitted a December 30, 1999 letter from Ms. Bell, in which she apologized for including appellant in a meeting with Mr. Salter. In a December 27, 2003 letter, Customer Service Manager N.W. Logeson informed appellant that he was expected to improve deficiencies and to attend staff meetings as scheduled. A March 5, 2004 letter from the employing establishment reflected that appellant had "met expectations" and had been awarded a four percent pay increase, pursuant to a 2003 merit performance evaluation.

In an undated chronology, appellant cited employment factors that he believed caused his condition:

1. On December 30, 1999 Mr. Bell ordered him to meet with Mr. Salter, in violation of his agreement and medical restrictions.
2. On June 3, 2002 Ms. Bell issued a letter of involuntary reassignment, ordering him to be moved from his position of managing customer service at Midtown Station to another facility approximately 11 miles from Midtown, where he would perform "substantially different duties."

¹ File No. 06-0728827.

3. On December 27, 2002 appellant was ordered back to Midtown Station and was expected to attend all staff meetings, training sessions or administrative meetings, in violation of his medical restrictions.

4. Appellant was required to work more than 40 hours per week, in violation of his medical restrictions. Appellant was told to remain at Midtown Station until the last carrier had returned to the station at the end of the day. Appellant stated his belief that “management thought their violation of [his] restriction would force [him] to leave [the employing establishment].”

5 Appellant’s October 10, 2003 medical leave request was denied, in violation of his medical restrictions and agreement.

6. On February 20, 2004 Acting Supervisor Willie Trawick failed to follow proper procedures when he reduced appellant in grade to a level five clerk. Appellant alleged that Mr. Trawick failed to provide reasons for his reduction and did not provide him with a limited-duty job in writing.

7. On March 1, 2004 appellant was offered a limited-duty job. On that same date a notice of proposed removal was mailed to him for his failure to attend staff meetings.

8. The employing establishment’s charge of unsatisfactory work performance on its March 1, 2004 notice of proposed removal was inconsistent with its March 5, 2004 letter stating that appellant had “met expectations” on his performance review.

Appellant submitted statements from several coworkers. Danny Drew, a letter carrier at Midtown Station and shop steward, indicated that from June 2002 through January 2003, he had filed 33 grievances against management involving contractual violations and disciplinary actions. In an April 23, 2004 statement, Mr. Drew noted that appellant had worked past normal working hours at Midtown, as late as 6:00 to 8:00 p.m. In a statement dated April 20, 2004, Barbara Hatcher indicated that she had seen appellant at work as late as 7:45 p.m. for purposes of closing the station. In a statement dated April 23, 2004, Carrier E.G. Roebuck observed that appellant had been at the station as late as 7:00 p.m. waiting for carriers to return from the street. In undated statements, W.P. Robinson and Margaret Andrews noted that they periodically reported to appellant after 5:00 p.m. In an undated statement, David Ross, acting manager of the Bayside Station from November 2002 through April 2003, indicated that he had reported to appellant as late as 6:15 p.m. after all carriers had returned to the station. In an April 23, 2004 statement, Richard Rose related that he notified appellant on a daily basis after all carriers had returned to his station, usually around 5:55 p.m. In an April 21, 2004 statement, Darren A. Armstrong, a clerk at the Midtown Station, indicated that appellant stayed at work until the last carrier was accounted for, usually around 7:30 p.m. In an April 4, 2004 statement, Kem Hall reported that on February 20, 2004 he witnessed Mr. Trawick reduce appellant to a mail processing clerk. In a March 3, 2004 statement, Earl Watson, Jr. noted that appellant spoke to him twice about his reassignment to a clerk position in mail processing.

In an April 6, 2004 return to work clearance slip, Dr. Koch indicated that appellant was incapacitated from March 13 to April 6, 2004.

On April 29, 2004 the employing establishment controverted appellant's claim. The employing establishment contended that it had complied with appellant's agreed-upon medical restrictions, namely that he not be required to attend meetings where Mr. Salter would be present. The employing establishment further argued that appellant's condition was a reaction to administrative actions and, therefore, not compensable.

In an April 27, 2004 report, Dr. Koch opined that the employing establishment's continued violations of medical restrictions and attempts to modify his limited-duty agreement "aggregated, precipitated or accelerated" his disability.

Appellant submitted a letter of decision dated July 9, 2003 from the employing establishment finding sufficient evidence to warrant issuance of a May 15, 2003 letter of warning, based on appellant's failure to answer suspense memorandums from January 6 through March 5, 2003. Appellant submitted a letter of decision dated December 22, 2003, finding that a November 17, 2003 proposed letter of warning was warranted and that he continued to perform in an unsatisfactory manner. By letter dated February 18, 2004, the employing establishment found that a December 17, 2003 letter of warning should be enforced, due to appellant's unsatisfactory job performance.

The record contains a letter dated November 5, 2001 from Dr. Koch, who stated that "the only restriction that [he was] aware of is [that] [appellant] be spared from meeting with Mr. James Salter." Dr. Koch also indicated that appellant's transfer from customer service to a new job added stress.

In a May 28, 2004 report, the employing establishment identified specific charges for appellant's termination and identified disciplinary actions that were taken in an attempt to assist appellant in improving his performance. Disciplinary actions included: a May 15, 2003 letter of warning in lieu of suspension for failure to respond to email messages; a July 7, 2003 assignment to a performance improvement plan for failure to respond to email messages and to suspense items; an October 31, 2003 notice of unsatisfactory performance for failure of performance improvement plan; a December 22, 2003 decision to enforce letter of warning for failure to respond timely to suspense items; a February 18, 2004 decision to enforce letter of warning for failure to maintain station dispatch log; and an April 5, 2004 decision to remove appellant from the employing establishment for failure to improve performance, to accept responsibility and perform duties in a satisfactory manner.

Appellant submitted a December 27, 2002 letter from the Office informing appellant that, upon his assignment to Midtown Station, he would be expected, among other things, to attend all staff meetings and administrative meetings.

In a letter dated July 22, 2004, the Office informed appellant that it would consider only the events that occurred on or after February 20, 2004 in his occupational disease claim, in that events prior to that date were covered under his prior 1999 claim. The Office also informed

appellant that the evidence submitted was insufficient to establish his claim and advised him to provide additional information within 30 days.

By letter dated February 20, 2004, Dr. Koch indicated that appellant should be placed on sick leave for an indefinite period of time. In an April 6, 2004 report, Dr. Koch stated that appellant could "work within agreed job restriction," but that he was incapacitated from March 20 through April 2, 2004. In an April 1, 2004 letter, Dr. Koch stated that appellant's disability was due to the failure of his supervisor to recognize his light-duty assignment.

Appellant submitted a portion of a deposition from Ms. Bell dated July 10, 2001 in which she acknowledged that there was a restriction that appellant was not required to attend staff meetings with Mr. Salter.

In a statement dated July 28, 2004, appellant's wife, Carol Cassino-Moore, related that she was present at the June 29, 2004 mediation and that appellant chose to retire because he was told that he would not be allowed to return to the Postal Service. In a December 4, 2003 statement, Bryant Gilley reported that appellant refused to participate in a telecom with other station managers due to his medical restrictions.

In a narrative statement dated July 30, 2004, appellant alleged several instances of error and abuse on the part of the employing establishment:

1. The February 20, 2004 "reassignment" constituted mental abuse, in that it was not in writing and was without notice. Moreover, he claimed that his supervisor never intended to provide him with a limited-duty job, as evidenced by the fact that he subsequently received a notice of removal for failure to attend staff meetings. He further alleged that Patrick Carlin, postmaster "maliciously lied and mislead [him] to believe that [he] would be returning to work," but that instead of receiving a letter of job assignment, he received a letter of decision removing him from duty for failure to attend staff meetings for the previous six months.
2. The employing establishment erred in its March 1, 2004 notice of proposed removal by citing appellant's failure to attend staff meetings as a reason for removal. Appellant claimed that under Dr. Koch's March 23, 2003 report, he was restricted from working more than 40 hours per week and from attending administrative meetings.
3. On October 21, 2003 Mr. Carlin intimidated and threatened appellant by stating that he would not have a limited-duty manager working for him who refused to attend staff meetings. He further abused his power by stating in mediation that he would not allow appellant to return under any circumstances.
4. Appellant contended that removal was a personal decision, not an administrative action.

5. Appellant stated that Mr. Carlin improperly put him on administrative leave on April 5, 2005, contending that the injury compensation specialist was the person designated to so inform him.

In a February 25, 2004 attending physician's report, Dr. Koch described appellant's history of injury as "harassment through inappropriate reassignment."

By decision dated August 26, 2004, the Office denied appellant's claim, finding that he was not injured in the performance of duty. The Office determined that allegations made by appellant were administrative in nature.

On August 30, 2004 appellant requested review of the written record, contending that the actions of the employing establishment constituted error and abuse. Appellant submitted a March 12, 2004 letter in which he stated that, on February 20, 2004, Mr. Trawick had asked for his keys and told appellant that he had been reassigned to a level five clerk effective that date. He further indicated that the major charge in the Office's March 1, 2004 proposed removal was his failure to attend administrative meetings, even though that limitation had been accepted by the Office.

Appellant submitted a letter from Dr. Koch dated February 9, 2004 in which he contended that Ms. Bell misstated his restriction regarding appellant's attendance at staff meetings that caused him to come into contact with Mr. Salter. He indicated that "Mr. Salter was never the issue." In a September 27, 2004 letter, Dr. Koch stated that appellant was "precipitously fired on February 20, 2004." He noted that an agreement had been reached on his federal court claim and Equal Employment Opportunity (EEO) claims.

By decision dated February 10, 2005, the Office hearing representative affirmed the August 26, 2004 decision, finding that appellant had failed to identify any compensable factors of employment.

Appellant appealed the February 10, 2005 decision to the Board. On August 8, 2005 the Board remanded the case to the Office for development and clarification.² By decision dated October 11, 2005, the Office affirmed the February 10, 2005 decision, finding that appellant had failed to establish a compensable factor of employment.

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 illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act.³ The same result is

² Docket No. 05-833 (issued August 8, 2005).

³ 5 U.S.C. §§ 8101-8193.

reached when the emotional disability resulted from the employee's emotional reaction to the nature of a claimant's work or her fear and anxiety regarding her ability to carry out her duties.⁴ By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁵ Moreover, although administrative and personnel matters are generally related to employment, they are functions of the employer and not duties of the employee. Thus, the Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.⁶

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, which may be considered by a physician when providing an opinion on causal relationship, and which are not deemed factors of employment and may not be considered. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁷ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.⁸ As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim, but rather, must be corroborated by the evidence.⁹

With regard to emotional claims arising under the Act, the term harassment, as applied by the Board, is not the equivalent of harassment as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁰

⁴ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁵ See *Peter D. Butt, Jr.*, 56 ECAB ____ (Docket No. 04-1255, issued October 13, 2004). See also *Ronald K. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005); *Barbara J. Latham*, 53 ECAB 316 (2002).

⁶ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); see also *Ernest J. Malagrida*, 51 ECAB 287, 288 (2000).

⁷ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁸ See *Charles D. Edwards*, *supra* note 6.

⁹ *Charles E. McAndrews*, 55 ECAB ____ (Docket No. 04-1257, issued September 10, 2004); see also *Arthur F. Hougens*, 42 ECAB 455 (1991) and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

¹⁰ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is 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.¹¹

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that an emotional condition was caused or adversely affected by her employment.¹² Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.¹³

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied his claim on the grounds that he had not established any compensable factors of employment. The Board must, therefore, initially review whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

Appellant alleged that he experienced stress as a result of his June 3, 2002 reassignment from his position as customer service representative at the Midtown Station to another facility approximately 11 miles from Midtown, where he was to perform substantially different duties. The Board notes that appellant's reactions must be considered self-generated, in that they resulted from his frustration in not being permitted to work in a particular environment and, therefore, are not compensable under the Act.¹⁴

Appellant alleged that he was demoralized by abusive and unfair treatment at the employing establishment. He claimed that Mr. Carlin lied to and mislead him into thinking he would be offered a limited-duty job. Instead, he was fired. Appellant alleged that the employing establishment intentionally violated his medical restrictions in an effort to force him to resign. He further claimed that Mr. Carlin intimidated and threatened him by stating that he would not have a limited-duty manager working for him who refused to attend staff meetings. To the extent that certain actions and incidents alleged as constituting harassment or disparate treatment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁵ However, for

¹¹ *James E. Norris*, 52 ECAB 93 (1999).

¹² See *Charles D. Edwards*, *supra* note 6.

¹³ See *Ronald K. Jablanski*, *supra* note 5; *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹⁴ *Ernest J. Malagrida*, *supra* note 6.

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

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.¹⁶ Appellant did not provide any corroborating evidence to establish harassment on the part of his supervisors.¹⁷ There is no evidence of record substantiating appellant's claim that his supervisors intentionally violated his medical restrictions or misled him. On the contrary, on the one documented occasion when he was required to appear at a meeting with Mr. Salter, Ms. Bell apologized and assured appellant that he would not be required to meet with Mr. Salter in the future. The Board finds appellant's reactions to be self-generated, thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

The record reflects that appellant filed an EEO complaint. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁸ Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. 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 by supporting his or her allegations with probative and reliable evidence.¹⁹

Appellant alleged that he was treated abusively by his supervisor when he was transferred to Midtown Station on December 27, 2002. He claimed that the employing establishment erroneously denied his request for medical leave to attend an October 10, 2003 appointment and followed improper procedures when it reduced him in grade on February 20, 2004, by failing to provide notice or reasons for the reduction in writing. Appellant further claimed that the employing establishment's charge of unsatisfactory work performance in its March 1, 2004 notice of proposed removal was inconsistent with its March 5, 2004 performance review, which indicated he had "met expectations." The Board has held 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.²⁰ Although the assignment of work duties and disciplinary matters are generally related to the employment, they are administrative functions of the employer rather than regular or specially assigned work duties of the employee.²¹ Where disability results from an employee's emotional reaction to certain administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, the disability does not fall within coverage of the Act.²² However, an administrative

¹⁶ *Id.*

¹⁷ *Roger Williams*, 52 ECAB 468 (2001).

¹⁸ See *James E. Norris*, *supra* note 11. See also *Parley A. Clement*, 48 ECAB 302 (1997).

¹⁹ See *James E. Norris*, *supra* note 11. See also *Michael Ewanichak*, 48 ECAB 354 (1997).

²⁰ See *Phillip L. Barnes*, 55 ECAB ____ (Docket No. 02-1441, issued March 31, 2004); *Roger Williams*, *supra* note 17; *Marguerite J. Toland*, *supra* note 15; *Dennis J. Balogh*, 52 ECAB 232 (2001).

²¹ *Id.*

²² *Roger Williams*, *supra* note 17.

or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.²³ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁴ Appellant has not shown that it acted abusively or erroneously with regard to the above-referenced allegations.

With respect to appellant's allegations that the employing establishment acted abusively by requiring him to work outside of his medical restrictions, the Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.²⁵ The Board finds that appellant has alleged a compensable factor of employment with regard to his required attendance at a December 30, 1999 meeting with Mr. Salter. In this case, the record reflects that the employing establishment was aware of appellant's restriction that he should not be required to attend meetings with Mr. Salter. Although it made an effort to comply with the restriction, the record clearly reflects that appellant was required to attend the December 30, 1999 meeting with Mr. Salter. Therefore, appellant's reaction to that meeting is a compensable factor of employment. Although there is some ambiguity in the evidence as to whether or not appellant's medical restrictions included a 40-hour workweek and nonattendance at all administrative meetings,²⁶ the record clearly reflects that appellant was required to and did consistently work outside his regular hours. Appellant alleged that he experienced stress as a result of working in excess of 40 hours per week. The employing establishment did not dispute appellant's claim that his regular hours were 8:00 a.m. to 5:00 p.m. Moreover, appellant's allegations that he was required to remain at his station until the last carrier returned from the street and routinely worked substantially past 5:00 p.m., were corroborated by numerous coworkers. The Board finds, under the principles set forth in *Cutler*,²⁷ appellant has established a compensable factor of his federal employment regarding the requirement that he work in excess of 40 hours per week.²⁸

As appellant has established compensable employment factors, the Office must base its decision on an analysis of the medical evidence.²⁹

²³ *Reco Roncaglione*, 52 ECAB 454 (2001).

²⁴ *James E. Norris*, *supra* note 11.

²⁵ *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

²⁶ On August 23, 1999 Dr. Koch recommended that appellant return to work with the limited-duty accommodations outlined in Ms. Bell's June 1, 1999 letter, including that he be excused from attending any meetings that would cause him to come in contact with Mr. Salter. A March 23, 2000 attending physician's report provided restrictions including "40 hours per week; no administrative meetings." Dr. Koch did not dispute the terms of the employing establishment's June 1, 1999 letter until February 9, 2004.

²⁷ *Lillian Cutler*, *supra* note 4.

²⁸ *Phillip J. Barnes*, *supra* note 20. *Peter J. Smith*, 48 ECAB 453 (1997).

²⁹ *Phillip J. Barnes*, *supra* note 20; *Robert Bartlett*, 51 ECAB 664 (2000).

CONCLUSION

The Board finds that appellant has established compensable factors of employment. Accordingly, the Office must base its decision on an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.³⁰ After further development as deemed necessary, the Office should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 11 and February 10, 2005 are set aside and remanded for further proceedings consistent with this decision.

Issued: April 19, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

³⁰ *Id.*