United States Department of Labor
Employees' Compensation Appeals Board

LESTER DEBERRY, Appellant	)	
	)	**Docket No. 06-298**
and	)	**Issued: June 21, 2006**
DEPARTMENT OF HOMELAND SECURITY, U.S. COAST GUARD, Portsmouth, VA, Employer	)	

Appearances:
Lester Deberry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 18, 2005 appellant filed a timely appeal from a September 20, 2005 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition. 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 has established that he sustained an emotional condition while in the performance of duty.

FACTUAL HISTORY

On August 27, 2004 appellant, then a 37-year-old air conditioning equipment mechanic, filed a traumatic injury claim alleging that on August 15, 2004 he experienced work-related emotional and physical stress. He stopped work on August 16, 2004. The employing establishment controverted the claim on the grounds that the medical evidence provided by Dr. E. Daniel Kay, Jr., a psychiatrist, established that appellant's emotional condition developed after his return from military deployment.

By letters dated September 24, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence to establish his claim.

In a September 15, 2004 memorandum, the employing establishment controverted appellant's claim based on Dr. Kay's August 30, 2004 medical report. Dr. Kay found that appellant experienced depression for several months after his return from deployment in the desert. Dr. Kay diagnosed a single episode of severe major depression with delusions which rendered appellant unable to work. He stated that patients with this problem tended to respond slowly. Dr. Kay anticipated that appellant would be out of work for at least two months, perhaps three, before it would be safe for him to return. There was a possibility that he could not return to his regular job with the same people without the risk of activating the paranoia again.

Appellant submitted email messages regarding his request for leave to attend annual military training and a consultation with a union representative to discuss filing a grievance about a discussion sheet prepared by his supervisor. In an October 12, 2004 narrative statement, appellant attributed his emotional condition to having his role as acting supervisor, taken away from him by Thomas Jewett, his supervisor. He stated that Mr. Jewett, without explanation, gave the supervisory position to Mr. Brown, a coworker. Appellant contended that his task to train Mr. Jewett about processing procurement requests which was subsequently taken away from him.

Appellant contended that, on December 12, 2002, Mr. Brown lowered his performance rating based on unsubstantiated facts which reduced his chances of being promoted to a supervisor. He stated that, due to harassment at the employing establishment, he started taking medication prescribed by Dr. James T. Saunders, an internist. On February 8, 2003 appellant was called to active duty in Iraq and he experienced more harassment and discrimination which aggravated his emotional condition. Upon his return, Dr. Saunders referred him to Dr. Kay for a psychiatric evaluation. Appellant stated that he advised his supervisor and associates that he was taking prescribed medication. Nonetheless, he believed his supervisor applied excessive pressure on him.

Appellant alleged that Keith Beko, a supervisor, never responded to his April 29, 2004 request for approval to attend military training from May 24 through 28, 2004 and June 7 through 19, 2004, although appellant completed the May 2004 training.

Appellant contended that he and a coworker were assigned to remove and install an air-handling unit and perform associated ductwork. The unit was installed on May 18, 2004 and they waited for Mr. Beko to order the ductwork and related materials to finish the job. Appellant stated that he did not order the necessary materials. He disagreed with Mr. Beko's decision to reschedule his military orders from June 7 to 18 to June 14 through 25, 2004 so that he could complete the job as he did not properly plan the assignment and later contracted the work outside the employing establishment.

On June 7, 2004 appellant stated that he was assigned to troubleshoot and repair a freezer with faulty wiring. He became upset because he believed he could have been electrocuted or killed and that his supervisor had to have been aware of the situation. Appellant noted that,

while he was reporting this incident to Gene C. Leonard, a facility manager, Mr. Beko yelled at him for being away from his job site and failing to use the proper chain of command to register his complaint. Appellant provided the names of individuals who witnessed this incident.

Appellant contended that, when he returned from annual training held from June 14 through 25, 2004, Mr. Beko issued a discussion sheet on June 30, 2004 regarding a May 17, 2004 assignment which required him to repair a humidity alarm. The alarm had been installed while he was deployed in Iraq and he was not briefed about it prior to his assignment, which was the normal practice. Appellant contended that it was not a safe practice to send employees to work on new or old installations that they had not been briefed about. On June 30, 2004 he requested a meeting with a union steward who requested all documents relating to the installation of the alarm.

Appellant also contended that, on August 16, 2004, Mr. Beko wrongfully accused him of nearly burning down an administration building. He believed that the employing establishment had set him up.

Appellant submitted correspondence regarding his union steward's request for information related to the May 17, 2004 work assignment and the employing establishment's request for medical documentation to support his absence from work during the period August 16 through 20, 2004. He also submitted Mr. Beko's June 1, 2004 discussion sheet about the May 17, 2004 assignment which found that he failed to timely investigate a problem with a high humidity alarm that had a broken belt which caused a ceiling to collapse. Appellant did not follow proper procedures for handling this work assignment and he did not perform the job at his journeyman level.

By letter dated November 4, 2004, the Office requested that the employing establishment provide additional information regarding appellant's claim. In a December 20, 2004 letter, Mr. Leonard stated that appellant failed to submit medical documentation regarding his absence from work due to his emotional condition as requested by Mr. Beko. He was not aware of any factors within the workplace that would cause appellant's emotional condition and described the duties of his air conditioning equipment mechanic position. Appellant's last performance rating, for the period ending March 31, 2004, was "meets," and Mr. Leonard denied lowering the rating as appellant had received a "meets" rating for the past several years even though he had been counseled on several occasions regarding his performance. He was not required to work overtime or travel during that calendar year and he had not been given assignments outside the scope of his position description. Although there were vacancies in his shop and an employee was out due to medical reasons, appellant's workload did not increase. Mr. Leonard noted that the shop supervisor had been performing employees' work duties and was unaware of any conflicts he had with his coworkers or supervisor.

Mr. Leonard denied that appellant was placed in an acting supervisor position, as no there was no documentation for this action as required. Further, Mr. Jewett was not trained by appellant on procurement procedures, as he was a retired senior chief with 22 years of experience. Mr. Crozier's retirement in June 2002 created a vacancy in the shop supervisor position; however, appellant did not apply for the advertised position and, thus, could not be considered for it. On December 12, 2002 appellant received a progress review and not a

performance appraisal as alleged. It was used to identify his shortcomings and accomplishments and no ratings were given.

Mr. Leonard stated that appellant did not inform his supervisor or anyone in his chain of command that he was taking drugs that could affect his ability to operate machinery, which jeopardized his safety and that of his coworkers. It denied appellant's request for leave to attend military training in the reserves from June 7 to 18, 2004 due to the workload in the shop. Mr. Beko made arrangements with his Reserve coordinator to attend training from June 14 through 25, 2004. The schedule change would not have been necessary if appellant had discussed the dates with his supervisor prior to scheduling the training. Appellant's supervisor had a responsibility to ensure adequate coverage to perform heating/ventilation/air conditioning (HVAC) work assignments and schedule projects. Mr. Beko did not reschedule appellant's training to complete the air-handling work assignment rather he was waiting for appellant to provide him with a list of parts needed to perform the assignment. He was asked to provide the list on several occasions, but failed to do so. Mr. Beko did not want to hire an outside contractor, but had to do so given the limited staff on hand at that time. The employing establishment noted that if the work had been performed in-house, they would have saved approximately $10,000.00.

Since appellant's return from active military duty in January 2004, Mr. Beko counseled him on deficiencies in his work assignments. He had some difficulty troubleshooting and required assistance from the work leader and supervisor in performing certain tasks. As a journeyman HVAC mechanic, he should have been performing his duties with minimal supervision. Mr. Beko stated that in April 2004 appellant failed to follow manufacturer's instructions for connecting a variable air volume within a building and was unable to connect the wiring correctly. Mr. Beko had to show appellant how to properly connect the wire. In June 2004, a freezer was replaced because appellant stated that it had faulty wiring. Another employee later discovered that the only problem was a shorted wired in the drip pan heater which should have been identified by appellant. This problem resulted in unnecessary spending. Also in June 2004, appellant failed to timely investigate a problem with a high humidity alarm that had a broken belt which caused a ceiling to collapse. Mr. Beko stated that appellant should have discovered the broken belt in a timely manner and that he was counseled regarding this incident. Appellant blamed the situation on installation problems and not the broken belt. On Thursday, August 12, 2004 appellant left a building while a vacuum was running. On Sunday, August 15, 2004 the building caught on fire. Appellant stated that the vacuum was probably still running when he left the work area. He contended that someone else must have been in the building as he "had removed the vacuum on Monday." Mr. Leonard stated that this was impossible because appellant used it on Thursday. Appellant asked Mr. Beko what was going to happen as a result of the fire and he responded that an investigation would be conducted. He requested leave and did not return to work.

In a statement of accepted facts prepared on March 15, 2005, the Office accepted that the June 7, 2004 incident involving the repair of a freezer with faulty wiring occurred in the performance of duty.

By letter dated March 28, 2005, the Office requested that appellant submit a medical report from an attending physician providing addressing whether he sustained a medical condition causally related to the accepted June 7, 2004 employment factor. The Office's letter

was accompanied by questions to be addressed by the physician, as well as, the March 15, 2005 statement of accepted facts. Appellant did not submit the requested evidence.

By letter dated August 18, 2005, the Office referred appellant to Dr. Harvey L. Nissman, a Board-certified psychiatrist, for a second opinion medical examination. In a September 1, 2005 medical report, Dr. Nissman noted the incidents to which appellant attributed to his emotional condition, psychiatric hospitalization and outpatient treatment. He diagnosed an adjustment disorder with depressed mood on Axis I, unemployment on Axis IV and a current global assessment of functioning (GAF) score of 65 and 65 last year. No diagnosis was provided on Axis II and III. Dr. Nissman opined that although appellant experienced stress due to conflict between himself and his superiors, he was not disabled as a result of this conflict nor did it precipitate a disabling mental illness. Dr. Nissman opined that it represented a preexisting problem of a similar event which occurred during his deployment in Iraq. He further opined that appellant's emotional condition was a direct result of an aggravation of a preexisting condition. Appellant's prognosis was good as he was capable of returning to his mechanic position although realistically it might be difficult for him to return to work in the same setting given the anger and frustration both parties felt. Dr. Nissman concluded that he should continue outpatient treatment with Dr. Kay.

By decision dated September 20, 2005, the Office found that appellant did not sustain an emotional condition while in the performance of duty. It found that the evidence of record established that his emotional condition arose from his military deployment. The Office determined that appellant's reaction to working with defective wiring in a freezer on June 7, 2004 constituted a fear of possible future injury or death which was self-generated and did not constitute a compensable factor of his employment. It further found that the denial of his training request, the allegation that he was responsible for a building fire and his removal from a supervisory position did not constitute compensable factors of his employment. Accordingly, the Office denied appellant's claim.

LEGAL PRECEDENT

A claimant 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 factors of his federal employment.[1] To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2]

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*,[3] the Board

[1] *Pamela R. Rice*, 38 ECAB 838 (1987).

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] 28 ECAB 125 (1976).

explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4] 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 under the Act.[5] 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.[6] 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 under the Act.

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.[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]

Where the disability results from an employee's emotional reaction to his or her 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.[9] 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.[10] 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.[11]

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[4] 5 U.S.C. §§ 8101-8193.

[5] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[6] *Lillian Cutler*, *supra* note 3.

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

[8] *Id.*

[9] *Lillian Cutler*, *supra* note 3.

[10] *Michael L. Malone*, 46 ECAB 957 (1995).

[11] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

ANALYSIS

Appellant attributes his emotional condition to having an acting supervisory position withdrawn by Mr. Jewett without explanation and given to Mr. Brown. He also attributes his emotional condition to being required to train Mr. Jewett about procurement procedures and later having this task taken from him. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act. This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties and that employees will at times dislike the actions taken.[12] Furthermore, mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.[13] Mr. Leonard denied that appellant was ever an acting supervisor because no documentation, as required, existed which placed him the position. In addition, he was not required to train Mr. Jewett, who had 22 years of procurement experience. The employing establishment stated that Mr. Jewett did not have Mr. Beko in mind to fill the supervisory position left vacant by Mr. Crozier's retirement and noted that appellant did not apply for the advertised position and, therefore, could not have been considered for the job. As there is no evidence of record to substantiate appellant's allegations that Mr. Jewett acted unreasonably, the Board finds that he failed to establish a compensable factor of employment under the Act.

Appellant further attributes his emotional condition to the lowering of his performance rating to "meets" by Mr. Brown on December 12, 2002 as it was based on unsubstantiated facts about his work performance. This matter involves an administrative function of the employer and not to the employee's regular or specially assigned work duties.[14] The employing establishment denied lowering appellant's performance rating. Mr. Leonard noted that appellant had received a "meets" performance rating for the past several years even though he had been disciplined on several occasions for his work performance. The employing establishment noted that since his return from active military duty in January 2004, his supervisor had counseled him on deficiencies in his work assignments which included difficulty troubleshooting, requiring assistance from the work leader and supervisor in performing certain tasks and failing to follow a manufacturer's instructions and to thoroughly assess problems. As a journeyman HVAC mechanic, the employing establishment stated that appellant should have been performing his duties with minimal supervision. Mr. Leonard further stated that on December 12, 2002 appellant received a progress review regarding his shortcomings and accomplishments and not a performance appraisal as no ratings were given. Based on these statements, the Board finds that appellant has not established error or abuse on the part of the employing establishment in rating his work performance.

Appellant alleges that he was harassed and discriminated against at the employing establishment and during his military deployment. He stated that Mr. Beko yelled at him while

[12] *Judy L. Kahn*, 53 ECAB 321 (2002).

[13] *Id.*

[14] *Beverly A. Spencer*, 55 ECAB ___ (Docket No. 03-2033, issued May 3, 2004).

he was reporting the June 7, 2004 incident to Mr. Leonard. Harassment and verbal abuse when shown to have occurred is considered a compensable factor of employment. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[15] Mr. Leonard denied that appellant was harassed at work. It was not aware of any factors within the workplace that would cause his emotional condition. Appellant was not required to work overtime or travel. He was not given assignments outside the scope of his position. The employing establishment was not aware of any conflicts he had with his coworkers or supervisor. Although appellant provided the names of witnesses to the alleged yelling incident, he did not submit any statements from these individuals to substantiate his allegations. The Board, therefore, finds that he has not established as factual a basis for his perception of harassment by the employing establishment as he did not provide any probative evidence to establish that harassment occurred[16] and, therefore, did not establish a compensable employment factor with respect to harassment.[17]

Appellant alleges that Mr. Beko did not respond to his request for leave to attend annual military training from May 24 to 28 and June 7 to 19, 2004 and that he subsequently denied his leave request for this period. He disapproved of Mr. Beko's decision to reschedule his military training so that he could complete a work assignment, which he thought was poorly planned because Mr. Beko delayed in ordering the necessary materials to complete the job and later hired an outside contractor. Leave use is a noncompensable administrative matter unless error or abuse is shown.[18] Mr. Leonard noted that appellant's leave request was denied due to the workload in his shop. Although his workload had not increased, there were vacancies in the shop, an employee was out due to medical reasons and the shop supervisor was performing employees' work duties. It was the supervisor's responsibility to ensure adequate coverage for HVAC work assignments and to schedule projects. The employing establishment later granted appellant's leave request for a different time period after consulting with his Reserves coordinator. However, this modification, in and of itself, does not establish administrative error or abuse.[19] The employing establishment stated that appellant would not have had any leave problems if he had discussed the dates for training with his supervisor prior to scheduling the training. Mr. Beko did not delay the completion of his work assignment to make appellant reschedule his training. Rather, he was waiting on appellant to provide a list of parts needed to complete the assignment, but he failed to do so. In addition, Mr. Beko preferred having the

[15] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

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

[17] *See Jamel A. White*, 54 ECAB 224 (2002).

[18] *James P. Guinan*, 51 ECAB 604, 607 (2000).

[19] *Michael Thomas Plante*, 44 ECAB 510 (1993).

assignment completed in-house but due to a limited staff, he had to spend approximately $10,000.00 to hire an outside contractor.

Appellant's belief that he could have been electrocuted or killed while working on a freezer with faulty wiring on June 7, 2004 does not constitute a compensable factor of employment under the Act. The Board has held that fear of future injury is not compensable.[20] Further, the Board has held that such a reaction is a self-generated frustration from not being permitted to work in a particular environment and is not compensable under the Act.[21]

Appellant contends that his emotional condition was caused by Mr. Beko's discussion sheet regarding the May 17, 2004 incident and false accusation that he nearly burned down a building. However, disciplinary actions including oral remands, discussions or letters of warning for conduct are noncompensable administrative actions unless the employee shows management acted unreasonably.[22] On June 1, 2004 Mr. Beko discussed appellant's failure to timely investigate a problem which caused a ceiling to collapse, to follow the proper procedures for handling this work assignment and to perform this assignment at his journeyman level. The Board finds that the employing establishment acted reasonably in counseling appellant. His consultation with a union steward about filing a grievance related to the disciplinary action also involves an administrative matter.[23] In this case, the record does not contain a final decision finding that the employing establishment erred or acted abusively in issuing the discussion sheet. The Board, therefore, finds that the record does not establish a compensable factor of employment based on administrative error or abuse. Moreover, the record does not establish that the employing establishment erred in planning to investigate the building fire, which pertains to an administrative matter.[24] Mr. Leonard explained that appellant admitted that a vacuum was still probably running when he left the building on Thursday, August 12, 2004. It noted a discrepancy in his explanation regarding the cause of fire that someone else must have left the vacuum running because he last used the vacuum on Monday when he actually used it on the following Thursday and the fire occurred on the following Sunday. Based on appellant's admission and the discrepancies in his statements, the Board finds that the employing establishment acted reasonably in conducting an investigation of the building fire. Appellant has failed to establish a compensable factor of employment under the Act.

Finally, the employing establishment's request for medical documentation for appellant's absence from work involves an administrative function of the employer and does not relate the employee's regular or specially assigned work duties.[25] The employing establishment noted that he failed to submit the requested medical documentation. Appellant did not submit any evidence establishing that the employing establishment committed error or abuse in requesting medical

[20] *Brenda L. Dubuque*, 55 ECAB ___ Docket No. 03-2246 (issued January 6, 2004).

[21] *Peter D. Butt Jr.*, 56 ECAB ___ Docket No. 04-1255 (issued October 13, 2004).

[22] *Janice I. Moore*, 53 ECAB 777 (2002).

[23] *Diane C. Bernard*, 45 ECAB 223 (1993).

[24] *Judy L. Kahn*, 53 ECAB 321 (2002).

[25] *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

documentation. The Board finds that he has failed to establish a compensable employment factor under the Act.

CONCLUSION

As appellant has not identified any compensable factors of his employment, the Board finds that he has failed to establish that he sustained an emotional condition while in the performance of duty.[26]

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2006
Washington, DC

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

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

[26] As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment as the cause of his emotional condition, the medical evidence relating appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).