United States Department of Labor
Employees' Compensation Appeals Board

JUAN E. MORGAN, Appellant	)	
and	)	**Docket No. 06-424**
	)	**Issued: June 5, 2006**
DEPARTMENT OF AGRICULTURE, ANIMAL & PLANT HEALTH INSPECTION SERVICE, INTERNATIONAL SERVICES, Panama City, Panama, Employer	)	

Appearances:
Juan E. Morgan, 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 December 9, 2005 appellant filed a timely appeal from the July 29, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration and a December 14, 2004 merit decision denying his claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition while in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 19, 2003 appellant, then a 50-year-old administrative officer, filed an occupational disease claim (Form CA-2) alleging that on April 8, 2003 he first became aware that his emotional condition was caused or aggravated by his employment. Appellant attributed stress to his supervisors inaccurately evaluating his performance; attempts to terminate his employment; and false and inflammatory statements made at the employing establishment. He additionally alleged that personnel at the employing establishment had used his daughter's illness for their benefit, withheld information and lied about his character, professionalism, conduct and duty performance.

In a separate statement, appellant stated that his stress began shortly after he arrived in Panama City, Panama, in September 2000. He cited the persistent failure or refusal of his supervisors to perform their duties honestly and a hostile work environment. Appellant stated that the "hostility consisted in allowing hearsay to dictate their behavior towards my person, failure to follow promises to help with my daughter's cancer treatment, withholding information from me, ignoring my authority before my subordinates, contributing to financial deprivation, lying about me to others, et al." He was hospitalized in April and May 2003 for post-traumatic stress disorder, burnout syndrome, occupational health problems, intense and persistent pain in the lumbar spine, persistent migraine headaches, elevated blood pressure and heart irregularities. Prior to his hospitalization, he experienced stress over the pending termination of his status with the Foreign Service program and the fact that there was no supervisory support in dealing with labor issues. Appellant stopped work on April 2, 2003. The record reflects that appellant's limited noncareer Foreign Service appointment was not converted into career status and his appointment was terminated on or about April 17, 2003. The employing establishment indicated that appellant resigned in a letter dated September 15, 2003.

Appellant submitted medical reports which addressed his orthopedic, neurological and psychological conditions. These consisted of a May 10, 2003 medical report from Dr. Rolano Chin, an orthopedic surgeon; March 29, April 5, 10 and 29, 2003 medical reports from Dr. Antonio Donadio, a neurologist; and an April 8, 2003 report from Dr. Dorian A. Lagrotta Castillo, a psychiatrist. Dr. Castillo diagnosed post-traumatic stress disorder, depressive disorder with anxiety, burnout syndrome (labor stress) and an occupational problem.

In a May 20, 2003 statement, James P. Swenson, appellant's supervisor, disputed appellant's allegations. With respect to evaluating appellant's performance, Mr. Swenson stated that the first performance review, which covered the period of appellant's arrival in Panama (end of September 2000) to the end of the rating period for Foreign Service employees (April 2001), resulted in a satisfactory rating, which appellant accepted without comment or exception. Appellant also received a satisfactory rating in his second performance review, covering the period May 2001 to April 2002. Mr. Swenson stated that at appellant's December 2002 mid-year review, he provided specific examples with respect to appellant not displaying the same level of initiative in his assigned job as he had previously. Mr. Swenson also noted that appellant was offered a civil service position in Washington, D.C., in early 2002; however, due to his daughter's cancer treatment, appellant turned down the offer. The employing establishment made every effort to accommodate appellant's needs by approving all requested leave, which included donated leave, to allow him to spend time with his family during this

period. Mr. Swenson denied that he wanted to terminate appellant. He noted that the March 13, 2003 letter appellant received from headquarters terminating his temporary appointment also contained an offer for a civil service position at headquarters. Mr. Swenson contended that appellant never cited specific examples to support his allegation that the employing establishment had withheld information, lied about his character, professionalism, conduct or duty performance.

By letter dated September 3, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office noted that appellant's allegations were general in nature and that further information and corroborating evidence was needed. The Office also noted that the medical evidence submitted failed to describe the employment factors, which caused or contributed to his condition.

In a September 14, 2003 letter, appellant advised that his condition had deteriorated since May 2003 and requested time in which to provide evidence. However, no additional evidence was submitted.

By decision dated October 14, 2003, the Office denied appellant's claim finding that he failed to establish a compensable factor of employment.

In a letter dated October 11, 2004, appellant requested reconsideration. He alleged a hostile work environment from 2000 to 2003. Appellant submitted additional statements and documents in support of his allegations, including that his request for conversion from a limited noncareer status to career candidate status in the Foreign Service was denied on September 12, 2002. Appellant asserted that Mr. Swenson made a case for his termination and nonconversion into the Foreign Service program. He submitted an August 5, 2002 memorandum from Mr. Swenson, who recommended that appellant not be converted from his noncareer appointment based on the uncertainty of his continued presence in Panama due to the medical condition of his daughter. Mr. Swenson proposed that an alternative was to offer appellant a civil service position in the Washington, D.C. area for immediate transfer out of Panama. Appellant asserted that Mr. Swenson's recommendation was based on assumptions and innuendos about his daughter's illness and prognosis for the future and based on hearsay. He again contended that management created a hostile work environment by basing its decisions on hearsay. Appellant alleged that this decision had hurt and hindered his career in the Foreign Service. He filed an Equal Employment Opportunity (EEO) complaint regarding management's use of hearsay statements alleging it had retaliated against him.

Appellant alleged that on April 30, 2002, the employing establishment arranged for his transfer to the United States using his daughter's illness as an excuse. The offer to transfer him was based on the belief that he would not be able to accomplish his duties in Panama. He alleged that the employing establishment did not verify facts and wanted to remove him from Panama. Appellant again alleged that management lied about his character by discrediting him in front of subordinates, peers and supervisors and did so throughout the rating periods. He was never advised of concerns about his performance until the end of the rating period. Appellant stated that management had identified him as a black male on September 2002, but later changed

his racial category, without his knowledge, to a white male in October 2003.[1] He asserted it was stressful to deal with his racial category and identity, which was African American and this was done to harass him and his family. Appellant alleged false and inflammatory statements, which caused his disabilities. He submitted copies of affidavits from Ralph Iwamoto, Deputy Administrator, on July 23, 2004 and Dr. John H. Wyss, Assistant Deputy Administrator of International Services, on August 2, 2004 concerning his job performance. In a March 17, 2003 letter to appellant, Mr. Iwamoto advised him that his limited noncareer appointment would be terminated in 30 days. Appellant also submitted medical reports from Dr. Rolando Chin, an orthopedic surgeon, Dr. C. Lagrotta, a psychiatrist, Dr. Nereyda Davila, occupational medicine and Dr. Vadim Conton, a psychiatrist.

By decision dated December 14, 2004, the Office denied modification of its October 14, 2003 decision. The Office found that appellant failed to establish any compensable factors of employment.

In a letter dated February 4, 2005, appellant requested reconsideration and submitted nine pages of argument rebutting the findings in the December 14, 2004 decision. Appellant did not submit any additional evidence to support his arguments. The Office also received a January 6, 2005 medical report from Dr. Lagrotta.

By decision dated July 29, 2005, the Office denied appellant's request for reconsideration without conducting a further merit review.

LEGAL PRECEDENT -- ISSUE 1

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.[2] To establish his claim that he sustained an emotional condition in the performance of duty, an employee 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.[3]

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*,[4] the Board 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.[5]

[1] In an August 19, 2004 letter, appellant was listed as a black male and in an October 20, 2003 employee run, he was listed as a white male.

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

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

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

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.[6] 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.[7] 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.[8] 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.[9]

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.[10] 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.[11] 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.[12]

For harassment or discrimination to give rise to a compensable disability, there must be evidence that the alleged actions did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[13] When an employee alleges harassment and cites specific

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

[7] *Lillian Cutler, supra* note 4.

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

[9] *Id.*

[10] *Lillian Cutler, supra* note 4.

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

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

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

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 complaint standards. Rather, the issue is whether sufficient evidence has been submitted to factually support the claimant's allegations.[14]

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to a number of employment incidents and conditions. The Board must therefore initially review whether the alleged incidents and conditions of employment are compensable under the terms of the Act.

Appellant asserted that he was subjected to a hostile work environment from 2000 to 2003 and questioned employing establishment decisions regarding his career, alleging they were based on assumptions about his daughter's illness and "hearsay" statements from his supervisors. Appellant alleged that his daughter's illness was used as a pretext to remove him from Panama. He alleged that he was not apprised of performance problems or issues related to his job duties. As noted, mere perceptions of harassment or discrimination are not compensable. Appellant has the burden of establishing a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[15]

The evidence of record does not support appellant's allegation that the employing establishment used his daughter's illness as a means to have him leave Panama or to otherwise harass or retaliate against him. Mr. Swenson provided statements noting that the employing establishment offered to transfer appellant to a civil service position in Washington, D.C. in early 2002 but that appellant turned this position down. Given his daughter's illness, his managers also approved of all of appellant's requested leave, including donated leave. Appellant reviewed the March 13, 2003 termination notice of his temporary appointment, which also contained an offer of a civil service position at headquarters. The evidence does not establish error or abuse in these administrative matters. Therefore, a appellant has not established a factual basis for these allegations.

Further, appellant did not submit any evidence to establish that he was never notified of performance issues or other concerns related to his job duties. The evidence of record demonstrates that Mr. Swenson had informed appellant of his performance during each appraisal period and had discussed some issues with appellant's performance in the December 2002 mid-year review. Accordingly, the Board finds that this allegation cannot be considered to have occurred as alleged as appellant failed to establish a factual basis for his allegation.

Appellant largely attributed his emotional condition to the actions of his supervisors. It is noted that appellant's allegations of mistreatment pertain to erroneous personnel actions which include, performance appraisals, conversion to career status, reassignment and transfer and other personnel matters. As noted, workers' compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence establishes error or abuse on the part of

[14] *Id.*

[15] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell, supra* note 3.

the supervisor.[16] He alleged that the employing establishment made arrangements for his transfer from Panama to the United States, using "hearsay" in his performance evaluations, which lead to his nonconversion and his eventual termination from the employing establishment. He addressed change in his racial category to "white" on an employee run dated October 20, 2003. These matters are unrelated to appellant's regular or specially assigned work duties and do not fall within coverage of the Act, absent a showing of error or abuse. In general, although the handling of disciplinary actions, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee, absent a showing of error or abuse.[17]

Appellant has not submitted sufficient evidence to support his allegations that his supervisors committed error or abuse in discharging their supervisory or managerial duties. The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment and is therefore not compensable under the Act.[18] The evidence does not establish that the employing establishment offer to transfer appellant was done in error or abusively. The evidence further reflects, as denoted by Mr. Iwamoto's March 17, 2003 letter to appellant, that the denial of conversion into the Foreign Service program and his termination from his limited noncareer appointment were based on his lack of competitiveness compared to his peers. The decision of the Conversion Committee, which reviewed his performance and conduct and denied the conversion, indicated that his performance level was below what was expected for a person in his position. As noted, appellant's frustration from not being permitted to hold a particular position on to work in a particular environment is not a compensable factor under the Act. Appellant argued that his performance evaluations and comments on his job performance were based on "hearsay" however he failed to present any evidence to establish that the performance evaluations or personnel decisions of the Conversion Committee were in of error or abusive. Although appellant indicated that he filed an EEO complaint against the employing establishment, appellant submitted no finding or final decision from the EEO Commission to substantiate any allegations. The Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[19] Appellant has submitted insufficient evidence of error or abuse to support his allegation that the employing establishment exercised bad faith when it changed the racial category on October 20, 2003.

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

[17] *See Cyndia R. Harrill*, 55 ECAB ___ (Docket No. 04-399, issued May 7, 2004).

[18] *Id.* The Board has also held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of the Act. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse. *Linda J. Edwards-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004).

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

The Board finds that appellant has failed to establish a compensable factor of employment with regard to these allegations[20] and consequently has not met his burden of proof in establishing his claim for an emotional condition.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[21] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[22] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[23]

ANALYSIS -- ISSUE 2

The Office denied appellant's emotional condition claim on the basis that he did not establish any compensable employment factors with regard to the cause of his claimed emotional condition. On reconsideration, appellant has not established that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

Appellant submitted nine pages of argument addressing the findings in the December 14, 2004 Office decision. His assertions essentially reiterate his prior statements and arguments. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[24] As appellant's arguments are merely a reiteration of his prior allegations. The duplicative nature of his arguments does not require reopening the record for further merit review. Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second requirement under section 10.606(b)(2).

The evidence of record contains a January 6, 2005 medical report from Dr. Lagrotta. However, this evidence is not relevant in this case. In cases involving emotional conditions, the Board has held that when the matter asserted is a compensable factor of employment and the

[20] Where a claimant has not established any compensable employment factors, it is not necessary to consider the medical evidence of record. *Peter D. Butt, Jr., supra* note 13.

[21] 20 C.F.R. § 10.606(b)(2) (1999).

[22] 20 C.F.R. § 10.608(b) (1999).

[23] *Annette Louise*, 54 ECAB 783 (2003).

[24] *See James A. England*, 47 ECAB 115, 119 (1995); *Saundra B. Williams*, 46 ECAB 546 (1995).

evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[25] However, as appellant had not established any compensable factors, a review of the medical evidence was not necessary.[26] The January 6, 2005 medical report from Dr. Lagrotta, although new, is not relevant to the underlying issue and does not constitute a basis for reopening the case under the third requirement under section 10.606(b)(2).

Therefore, under 20 C.F.R. § 10.608(b) the Office properly denied appellant's application for reopening his case for a review on its merits.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish his emotional condition claim. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2005 and December 14, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 5, 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

[25] *Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004); *Norma L. Blank*, *supra* note 8.

[26] *See supra* note 20*; Diane C. Bernard*, 45 ECAB 223, 228 (1993).