United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 06-551**
	)	**Issued: October 24, 2006**
DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF THE INSPECTOR GENERAL, Philadelphia, PA, Employer	)	

Appearances:
Harry J. Cooper, Esq., for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument September 19, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 11, 2006 appellant filed a timely appeal from the November 21, 2005 merit decision of the Office of Workers' Compensation Programs, which 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 to review the merits of appellant's claim.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On February 5, 2004 appellant, then a 43-year-old senior auditor, filed a claim alleging that he sustained emotional distress, mental anxiety and chest pains in the performance of duty on January 21, 2004: "Traumatic injury caused by supervisors presenting my annual appraisal which showed that I had unacceptable performance, based on my attendance when I was

participating under the Family Medical Leave Act for serious health issues. This appraisal is unjustified and shows a hostile environment exists of harassment, intimidation and threats."

A March 8, 2004 report from appellant's family physician, Dr. Kathryn Rose-Vallejo, related his history of injury:

> "I have been treating [appellant] for well over one year for multiple medical problems. He has been treated in the past for depression related to his multiple medical issues. He has been quite stable in regard to his depression until an office visit January 23, 2004 when the patient came in complaining of chest pains, shortness-of-breath, feeling very irritable and upset. He had had an appraisal done at work and had received a bad rating. I was told this poor rating was the result of his missing multiple days of work, yet he had received time from work under the medical leave act and did not think this was a fair review. He became progressively more depressed, anxious and irritable. He was not sleeping well at night."

The employing establishment responded that prior to his January 21, 2004 annual performance evaluation, appellant had applied for disability retirement due to his serious health conditions, including diabetes, hypertension, chronic obstructive pulmonary disease, severe headaches and depression. The employing establishment tallied appellant's approved leave in calendar year 2003 -- a total of 1,036.25 hours, 407.25 of which fell under the Family Medical Leave Act -- and commented on his performance:

> "[Appellant] was not able to perform all of his required duties as a GS-13 senior auditor in accordance with expectations. As described in the answer to question 2 above, [he] was away from work for over 50 percent of the time in 2003. Frequently, these absences were unscheduled and unpredictable, causing day-to-day workload planning problems for OIG [Office of the Inspector General]. When [he] was present, his audit work was satisfactory. However, [appellant] had other responsibilities as a GS-13 senior auditor that could not be performed, including his inability to be a full-time member of the audit team, failure to meet general deadlines and inability to travel."

In a decision dated April 6, 2004, the Office denied appellant's claim for workers' compensation benefits. The Office found that the evidence was insufficient to establish appellant's allegations of harassment, intimidation and threats. The Office also found no evidence to support agency error or abuse in the January 21, 2004 annual performance evaluation.

Appellant requested a review of the written record by an Office hearing representative. The Office received, among other things, a copy of the disputed performance evaluation,

which rated appellant's performance as unacceptable. In comments attached to the evaluation, appellant's supervisor explained:

> "[Appellant] had been assigned to the Independent Diagnostic Testing Facilities (IDTF) audit during calendar year [CY] 2003. This is a nationwide audit and is being performed in conjunction with the Centers for Medicare & Medicaid Services [CMS], Miami Satellite Office. [Appellant] is the Senior Auditor and is responsible for supervising a staff of three auditors.
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> "During CY 2003, [appellant] had been out with a number of health problems that have affected his ability to perform at the GS-13 Senior Auditor level. [He] had taken a total of 996.25 hours of leave. This included sick leave, annual leave, donated leave, leave without pay and family medical leave. This equates to 124.5 days absent or 48 percent of the workdays.
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> "This assignment is highly complex and has encountered a fair share of problems. [Appellant's] experience, expertise and knowledge would have been a great asset to have had to address these problems in a timelier manner.…
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> "Because of his absences, the auditors have had to assume a greater role in reviewing each others' work and the work performed by the assist regions -- a task normally completed by the [s]enior [a]uditor. This has delayed completing the analysis of the assist regions and PSC contractor reviews.
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> "[Appellant] was unable to assist me in performing a supervisory visit to other regions or in meeting with the CMS Miami staff to discuss the audit progress, obstacles and concerns. As a result, I used one of the staff auditors to assist me. This additionally contributed to delays in completing our review.
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> "One of [appellant's] major responsibilities is report writing. However, because of his absences we are behind in preparing the preliminary draft report."
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> * * *
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> "I wish to point out that not all of the problems that occurred on this audit could have been avoided. However, due to [appellant's] absence, I had to spend more time trying to resolve them [than] I felt I should have.
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> "When [appellant] was present, I found his work to be of high quality. His experience, expertise and ability to work with the audit staff, IDTFs, and others were great. He is not afraid of challenges and would do what was necessary to get the job done. As noted above, he has not been able to work for about half a year. This has effected audit production and timeliness. The auditors assigned have been more than willing to do what is necessary to get out a quality product. Nevertheless, the fact that [appellant] has been out almost a half a year in CY 2003 due to illness and with little assurance that his extended absences will not continue in CY 2004, leaves me no choice but to advise you that he has not been able to perform the functions of a [s]enior [a]uditor."

In a decision dated November 21, 2005, the Office hearing representative affirmed the denial of appellant's claim for compensation benefits. The hearing representative found that his allegations of harassment were unsubstantiated and that error or abuse on the part of the employing establishment was not established.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[2] "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his employer's business, at a place where he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[3]

When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his 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 resulted from his emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation 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.[4]

Workers' compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment. Thus, an unsatisfactory performance rating, without more, is insufficient to provide coverage. Although the rating is generally related to the employment, it is an administrative function of the employer, not a duty of the employee. An emotional reaction

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[1] 5 U.S.C. § 8102(a).

[2] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[3] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

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

under such circumstances is considered self-generated. Exceptions will occur, however, in those cases where the evidence discloses error or abuse on the part of the employing establishment.[5]

The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[6] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[7] The primary reason for requiring factual evidence from the claimant in support of his allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[8]

ANALYSIS

It must be made clear at the outset that because appellant attributes his emotional condition to an administrative action -- his calendar year 2003 performance evaluation -- his claim is one that generally falls outside the scope of workers' compensation. An exception is recognized in those cases where the evidence discloses error or abuse on the part of the employing establishment. So for appellant to establish entitlement to compensation under the Act, he must show that his claim falls within this exception.

In his February 5, 2004 claim for compensation, appellant alleged that the appraisal in question showed a hostile environment of harassment, intimidation and threats, all of which are manifestations of administrative error or abuse. On appeal he states that there is substantial evidence of abusive behavior, constant harassment and a hostile work environment. Further, he asserts that the creation of a hostile and harassing work environment was deliberate and calculated. As noted earlier, actions of an employer which the employee characterizes as harassment may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment did in fact occur. The Board has reviewed the record on appeal, including the calendar year 2003 appraisal, and can find no evidence to substantiate the harassment, intimidation and threats alleged. Appellant has not met his burden of proof to establish a compensable factor of employment in this regard.

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[5] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991) (wherein the employing establishment acknowledged incorrectly applied performance standards).

[6] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[7] *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).

[8] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

But the clear thrust of appellant's claim is that the employing establishment erroneously used approved leave as a negative factor in evaluating his calendar year 2003 performance. Specifically, he argues a violation of the Family Medical Leave Act, which, he explains, prohibits employers from using the taking of Family Medical Leave Act leave as a negative factor in employment actions.

However, the Board has no jurisdiction to decide matters under the Family Medical Leave Act. This is not the appropriate forum to pursue a finding that the calendar year 2003 performance evaluation violated a particular section of the Family Medical Leave Act. The Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Federal Employees' Compensation Act.[9] Administrative error is a compensable factor of employment under the Federal Employees' Compensation Act, and a violation of the Family Medical Leave Act may establish the administrative error necessary to pursue appellant's claim under the Federal Employees' Compensation Act. But the Board will not step outside its jurisdiction to find such a violation. Appellant bears the burden of proof to establish the essential elements of his claim.[10] It is his responsibility to submit probative evidence, such a final decision or formal finding by an appropriate body, that the evaluation did indeed violate the Family Medical Leave Act. Without such evidence, the alleged violation is unfounded and cannot support appellant's claim for compensation under the Federal Employees' Compensation Act.

In his March 21, 2004 statement, appellant stated that he had filed a grievance over his appraisal on March 15, 2004. Just as the Board will not rule on whether the employer violated the Family Medical Leave Act, the Board will not adjudicate appellant's grievance. There is no evidence in the record that appellant has been successful in his grievance or in otherwise establishing, as a matter of proof, administrative error relating to his calendar year 2003 performance evaluation.

This leads to the second and broader problem with appellant's case, namely, the lack of substantial supporting evidence. Although it is the crux of his claim, appellant has submitted nothing, outside the Family Medical Leave Act allegation, to show that the employer was prohibited from using his extensive albeit approved absence from work as a negative factor in his performance evaluation. The record contains no relevant and binding union contract provision, no arbitrator's decision on point, not even so much as a similar case to support the argument appellant urges on appeal. Establishing a claim for compensation is a matter of proof. With no proof of administrative error, appellant's argument reduces to one of personal opinion: the appraisal was not fair. Because mere perception cannot discharge his burden, the Board will affirm the November 21, 2005 denial of compensation. Appellant has failed to establish a compensable factor of employment.

[9] 20 C.F.R. § 501.2(c).

[10] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty. His claim is not one that is generally covered by workers' compensation, and the evidence submitted does not permit a finding that the claim falls within the recognized exception for administrative error.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employee' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board