United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 07-753**
	)	**Issued July 25, 2007**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decisions dated August 15, 2006 which denied his claim for an emotional condition and October 25, 2006 which denied his request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

On March 8, 2006 appellant, then a 41-year old aircraft systems maintenance mechanic, filed an occupational disease claim alleging that he developed stress due to his job. He became

aware of his condition on March 3, 2006. Appellant stopped work on March 2, 2006 and returned on March 15, 2006.

Appellant submitted a February 27, 2006 return to work certificate prepared by Dr. Dan Ioanitescu, a Board-certified psychiatrist and neurologist, who noted that appellant was hospitalized from February 14 to 17, 2006 for work-related stress. Also submitted was a record of illness and treatment dated March 2, 2006, in which appellant noted that on December 21, 2005 a hangman's noose was left in his work area. He reported the incident to his supervisor who subsequently held a meeting and expressed his concerns over this type of behavior. Appellant became emotional at the meeting and started to cry and flipped over a table. The medical officer, whose signature is illegible, diagnosed job-related stress. A nursing note dated March 2, 2006 indicated that appellant reported an incident 18 months prior in which a hangman's noose was placed in his work area causing him to become very upset. He reported that a staff meeting was held where he became emotional and flipped over a work table and was subsequently disciplined. Appellant's Supervisor, Asia McLeod, submitted a statement dated March 3, 2006 and noted that, after he investigated the incident with the hangman's noose appellant's personality changed and he became passive.

By letter dated April 11, 2006, the Office asked appellant to submit evidence, including a detailed description of the employment factors or incidents that he believed contributed to his claimed illness.

Appellant submitted an undated statement alleging that he was passed over for promotion in favor of a Caucasian electrician who did not have aircraft mechanic skills. Subsequently he felt demeaned when he had to teach the new work leader the necessary skills to be proficient as an aircraft mechanic. Appellant alleged that in 2003, David Huntzinger, a Caucasian coworker, stated "wait, don't keep acting like that nigger." He alleged that another Caucasian coworker, Michael Gardner, attacked him with a sledge hammer and a large screwdriver and two years later threw a muffin at the head of his supervisor. Appellant alleged that in 2003 his coworkers hung a hangman noose in the work area and on December 21, 2005 they placed a hangman noose on his desk by his papers which caused him stress.

Appellant submitted medical records from a Veteran's Administration Medical Center (VA), admission dated February 14, 2006 noting that appellant was treated for post-traumatic stress and alcohol dependence. Dr. Ioanitescu reported an event in which appellant became aggressive towards his coworkers after racial statements were made during a conference. Appellant reported to Dr. Ioanitescu that he felt "constantly" discriminated against and scrutinized and feared prosecution for the work incident. He indicated that his racial sensitivity was related to witnessing a lynching of a neighbor when he was in fifth grade. Dr. Ioanitescu diagnosed post-traumatic stress disorder, history of alcohol use, possible major depression and history of right leg and foot trauma with significant reconstruction.

The employing establishment submitted a record of an investigation dated April 10, 2006 which summarized the facts and circumstances surrounding appellant's work-related occupational disease claim. It was noted that appellant and two other employees were rotated as alternate supervisors in the absence of Mr. McLeod, the permanent supervisor. On March 6, 2006 appellant indicated that his work-related stress was overwhelming and he requested to

resign from being appointed acting supervisor. The racial makeup of appellant's section was comprised of 4 African Americans, 1 to 2 Hispanics and approximately 10 Caucasians. Appellant was a military veteran from the Gulf War and was granted a 70 percent service-connected disability due to a right foot injury, eye impairment and post-traumatic stress disorder. His supervisor was interviewed and reported that appellant was a conscientious, reliable and dedicated employee and also an expert aircraft mechanic. The investigation found that a hangman's noose was anonymously made by one or more of appellant's coworkers about 18 months earlier and a second noose was made December 21, 2005 and placed in appellant's work area. Appellant reported that he witnessed a lynching when he was a child. Mr. McLeod called a maintenance branch meeting on December 21, 2005 which included discussions of a confederate flag, confederate belt and the hangman's noose. At this meeting, appellant overturned a table in a heated exchange with several Caucasian coworkers. As a result Mr. McLeod, appellant and Terry Orear, a coworker were facing disciplinary suspensions.

The investigator noted that appellant's coworkers had problems with appellant's leadership and sought to create conditions that would get him neutralized or fired for cause. The investigator concluded that on two occasions appellant's coworkers created conditions of racial tension to get appellant to react aggressively to their anonymous hangman's noose. The investigator concluded that appellant had an anger management problem which was fermented by his Caucasian coworkers who wanted to get him fired. The employing establishment submitted a memorandum dated April 14, 2006 which challenged appellant's claim on the basis that his work-related stress was an extension of his service-connected stress.

In a May 10, 2006 statement, Mr. McLeod stated that appellant's position entailed stress in completing tasks in a timely manner. He noted that prior to becoming appellant's supervisor he was informed of an incident in which a hangman's noose was found on an air conditioner in the area where appellant worked. Mr. McLeod advised that a similar incident occurred on December 21, 2005 when appellant found a hangman's noose in his work area. He held a staff meeting and informed the employees that this behavior would not be tolerated. Mr. McLeod indicated that during the staff meeting appellant began to cry uncontrollably and slammed a table down. After the staff meeting an investigation ensued. Mr. McLeod indicated that he was aware that appellant grew up in Mississippi and there were several lynching's in his area. Shortly after the incident, appellant was hospitalized for a stress-related condition brought on by his job and was off work for 45 to 50 days. Mr. McLeod noted that appellant was an outstanding worker who was concerned about his job and the quality of his workmanship.

In an August 15, 2006 decision, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.[1]

On September 15, 2006 appellant requested an oral hearing before an Office hearing representative.

[1] The Office decision references December 22, 2005 as the date appellant's coworkers placed a hangman's noose in his work area; however, this appears to be typographical error as the record indicates that the incident occurred on December 21, 2005.

In a decision dated October 25, 2006, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. The Branch of Hearings and Review found that, since appellant's September 15, 2006 request for an oral hearing was not made within 30 days of the Office's August 15, 2006 decision, he was not entitled to an oral hearing as a matter of right. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office.

LEGAL PRECEDENT -- ISSUE 1

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[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 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 an 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. Where the disability results from an employee's emotional reaction to his 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.[7]

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

[3] 28 ECAB 125 (1976).

[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 Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 3.

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]

ANALYSIS -- ISSUE 1

Appellant's allegations regarding his work assignments relate to administrative or personnel actions. In *Thomas D. McEuen*,[10] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act, as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[11]

Regarding appellant's allegations that he was passed over for a promotion to a Caucasian electrician who did not have aircraft mechanic skills, the Board finds 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.[12] The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.[13] Regarding appellant's allegation that he felt demeaned when he had to teach the new work leader the necessary skills to be proficient as an aircraft mechanic for which appellant was already qualified. The Board notes that this relates to frustration from not being permitted to work in a particular environment or to hold a particular position and is not

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

[9] *Id.*

[10] *See Thomas D. McEuen, supra* note 7.

[11] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

See Janet I. Jones, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[13] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

compensable.[14] The employing establishment has either denied these allegations or contended that it acted reasonably in these administrative matters. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations. Thus, he has not established administrative error or abuse in the performance of these actions and, therefore, they are not compensable under the Act.

Appellant alleged that he was racially discriminated against and harassed by his coworkers. He specifically alleged that in 2003, Mr. Huntzinger, a Caucasian coworker, stated "wait, don't keep acting like that nigger" and another Caucasian coworker, Mr. Gardner attacked him with a sledge hammer and a large screwdriver and two years later threw a muffin at the head of his supervisor. He also noted that in 2003 his coworkers placed a hangman's noose in the work area and on December 21, 2005 they place a hangman's noose on his desk by his papers which caused him stress. To the extent that incidents alleged as constituting harassment 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 harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[16]

The factual evidence fails to support appellant's claim of harassment with respect to the allegation that in 2003 Mr. Huntzinger, a Caucasian coworker, stated "wait, don't keep acting like that nigger," that another Caucasian coworker Mr. Gardner attacked him with a sledge hammer and that a promotion was unfairly granted to a Caucasian coworker. Although appellant alleged that his supervisors and coworkers engaged in actions which he believed constituted harassment and discrimination, he provided no corroborating evidence or witness statements to establish his allegations.[17] Thus, appellant has not established a compensable employment factor under the Act with respect to these allegations of harassment.

To the extent that appellant alleged verbal abuse by a coworker, Mr. Huntzinger, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[18] The Board finds that the facts of the case noted above, in the analysis of the allegation of harassment, are insufficient to establish this allegation as appellant did not provide corroborating evidence or witness statements.

However, appellant has established compensable factors of employment with respect to the allegation that in 2003 his coworkers placed a hangman's noose in his work area and on December 21, 2005 a hangman's noose was again placed on his desk by coworkers in an effort to

[14] *See supra* note 7.

[15] *See David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[16] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[17] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

[18] *Charles D. Edwards*, 55 ECAB 258 (2004).

harass and discriminate against appellant. These incidents are established as occurring and arising from appellant's performance of his regular duties. In an investigative summary dated April 10, 2006, it was noted that, 18 months prior, a hangman's noose was anonymously made by one or more of appellant's coworkers and placed in the work area and a second noose was made December 21, 2005 and placed near appellant's work area. After the December 21, 2005 incident, Mr. McLeod, appellant's supervisor, called a meeting which included discussions of a confederate flag, confederate belt and the hangman's noose and where appellant had a heated exchange with several Caucasian coworkers. The investigator noted that appellant's coworkers had problems with appellant's leadership and sought to create conditions that would get appellant terminated for cause. The investigator concluded that on two occasions appellant's coworkers created racial tension to get appellant to react aggressively to the anonymous hangman's noose. On May 10, 2006 Mr. McLeod noted that prior to becoming appellant's supervisor he was informed of an incident in which a hangman's noose was found on an air conditioner in the area where appellant worked. He advised that a similar incident occurred on December 21, 2005 when appellant found a hangman's noose in the work area and reported the incident to Mr. McLeod. Mr. McLeod indicated that he held a staff meeting and informed the employees that this behavior would not be tolerated. He indicated that during the staff meeting appellant began to cry uncontrollably and slammed a table down.

As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. The case will be remanded to the Office for the preparation of a statement of accepted facts and referral of appellant to an appropriate medical specialist for an opinion on whether he sustained an emotional condition in the performance of duty causally related to a compensable factor of employment. After such further development of the evidence as it considers necessary, the Office shall issue an appropriate decision on appellant's entitlement to benefits.[19]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[20] Section 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[21] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its

[19] *Leslie C. Moore*, 52 ECAB 132, (2000) (where the Board found that appellant implicated a compensable employment factor and remanded the case to the Office for the preparation of a statement of accepted facts and referral of appellant to an appropriate medical specialist for an opinion on whether he sustained an emotional condition in the performance of duty causally related to a compensable factor of employment).

[20] 5 U.S.C. § 8124(b)(1).

[21] 20 C.F.R. §§ 10.616, 10.617.

discretion.[22] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, *etc.*), hearing and review will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.[23]

ANALYSIS -- ISSUE 2

In the present case, appellant requested a hearing in a letter dated and post-marked September 15, 2006. Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[24] As the Office's decision was issued on August 15, 2006 the 30-day period for requesting a hearing began to run on August 16, 2006 and the last or 30th day was September 14, 2006. Since appellant's hearing request was dated September 15, 2006 it was untimely as it fell on the 31st day after the issuance of the Office's decision. Accordingly, appellant was not entitled to a hearing as a matter of right.

The Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[25] There is no indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

CONCLUSION

The Board finds that the case is not in posture for a decision with respect to appellant's claim for an emotional condition**.** The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

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[22] *Delmont L. Thompson,* 51 ECAB 155 (1999); *Eddie Franklin,* 51 ECAB 223 (1999).

[23] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record,* Chapter 2.1601.4(b)(3) (October 1992).

[24] 20 C.F.R. § 10.616.

[25] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision. The October 25, 2006 Office decision is affirmed.

Issued: July 25, 2007
Washington, DC

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

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

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