United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 06-1285**
	)	**Issued: June 14, 2007**
DEPARTMENT OF THE ARMY, CAMP ANACONDA, Balad, Iraq, Employer	)	

Appearances:
Minor W. "Trey" Davis, III, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2006 appellant, through counsel, filed a timely appeal from a November 17, 2005 decision of the Office of Workers' Compensation Programs denying his emotional condition claim and a February 8, 2006 nonmerit decision of the Office denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition causally related to compensable work factors; 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 August 3, 2004 appellant, a 43-year-old heavy equipment mechanic, filed an occupational disease claim for post-traumatic stress disorder (PTSD), anxiety and depression due to a hostile work environment and stressful conditions while working in Iraq. He alleged that he was subjected to race-based comments by coworkers and profanity written on a workbench

located next to his station bay. Appellant also attributed his condition to working 16 to 18 hours per day, exposure to temperature ranges from 115 to 130 degrees, daily mortar and rocket fire and a threat concerning a military vehicle driven by an unidentified individual. He noted that he had worked as a mechanic at the Red River Army Depot and his assigned duties were not stressful.[1] Appellant identified the stress in his employment arising after his deployment to Iraq. The record reflects that he was deployed to Iraq on or about March 28, 2004 until July 15, 2004.

In a letter dated August 17, 2004, the Office requested that appellant provide additional factual and medical evidence to support his claim.

By email dated May 4, 2004, appellant alleged that on April 10, 2004 Stuart Strain, a coworker, made a joke involving a racial epithet: "Hay [sic] David I had a home boy called N….. Bob every time we go to the club he would inter duce his self [as] N….. Bob, that is what he say now." He indicated that he tried not to think about this comment but became angrier the more he did. Appellant advised his supervisor of the statement on April 14, 2004. He stated that on May 6, 2004, he was called over to the next bay by an employee identified as Lake. Appellant stated that Lake was laughing and "had something to tell me that Kurt said about a southern black man. I ask[ed] him what was it? But he refused to tell me." He went to his tent, noting that he did not go back to work because he was "about to lose it."

On May 27, 2004 appellant filed an Equal Employment Opportunity (EEO) claim, concerning the incidents of April 10 and May 6, 2004. He stated that, while the harassment had stopped, none of his coworkers had been moved. Appellant subsequently alleged a hostile work environment, citing to a comment by Kenneth Britt, a coworker, who allegedly said on May 30, 2004: "It would nice to go home early and still get paid HA!" Later that day, while getting out of a vehicle at the dining facility, Mr. Strain and Mr. Britt pulled up next to appellant in another vehicle in a very fast manner. In June 12, 2004 statement, Warren B. Tuft, a coworker, noted that he was riding to the dining facility with appellant on May 30, 2004 when a military vehicle drove up fast and stopped near appellant's door while he was getting out. He stated that there was plenty of room in the parking lot so that the vehicle did not have to park so close to appellant's vehicle. Mr. Tuft observed Mr. Strain and Mr. Britt walk from the vehicle but did not know whether the action was intentional or not.

In a June 9, 2004 email, Elvei Jane Drake, an EEO counselor, addressed appellant's complaint noting that interviews had been obtained. Mr. Strain stated that "he did not recall making any racial comments at any time or of any thing of the like to you at any time in the past." However, Mr. Strain did acknowledged using the term "N… Joe" in a story and Ms. Drake advised Charles Burdette, appellant's supervisor, that Mr. Strain should be counseled and told that his remarks were inappropriate. At the time he told the story, Mr. Strain was unaware of whether appellant was within hearing distance. Ms. Drake noted that Mr. Strain had been counseled and that he "did not admit or deny that the allegations were or were not true, but did acknowledge that such comments were wrong and inappropriate." With regard to the other alleged incidents, "[o]ne person did not remember any slur being made" and another person indicated [that] he and his partner were making jokes about the North and South. Ms. Drake

[1] The record reflects that appellant worked in the Army from 1982 to 2000. His appointment as a heavy equipment mechanic was effective February 17, 2004.

noted that an employee stated that he called appellant over "to get back at his partner" and "jokingly told you that the other person was saying something racial, when in actuality he was not."

On June 14, 2004 appellant was seen in the mental health clinic for feelings of anger towards his coworkers. It was noted that he felt unsatisfied with the manner in which his complaints were being handled by his supervisor and stated that "the next person who makes a comment, I am going to dice them up." Appellant stated that he was in possession of a knife but would not tell the clinic specialist where he kept it. The attending medical officer met with appellant regarding his thoughts of hurting others. Appellant stated that his threat was the truth and what he would do if he encountered another incident that he perceived as racial or prejudicial. The health clinic records indicate that appellant was anxious with sleep disturbance and paranoid thoughts.

In a June 18, 2004 memorandum, Elmar Cotti, a civilian deputy to the military commander, described a June 14, 2004 meeting held to address appellant's concerns regarding alleged racial comments and adverse incidents. Mr. Burdette, appellant's supervisor, discussed instructions that he received to first contact the EEO office at Red River Army Depot as appellant was a civilian. Mr. Burdette collected written statements and counseled employees regarding prohibited discrimination at the vehicle support center. Appellant was offered the opportunity to move to another work location, but declined as the entitlements would be less at other locations and he viewed such a move as a form of punishment. The memorandum then detailed actions that would be taken which appellant stated would make him feel more secure about staying at his current work location. Mr. Burdette agreed to move two employees involved in the original complaints away from appellant's workstation. It was agreed that the parties would meet again on June 23, 2004 to reassess appellant's working environment.

In a July 10, 2004 memorandum, Lt. Col. Scott T. Allen noted that he had recently assumed charge of the support center and had been informed that appellant had experienced great difficulty in working with other personnel, resulting in an EEO complaint and appellant's referral to anger management counseling by a psychiatrist. He cited an incident the previous day involving appellant and a coworker in the break room, where tables were pushed between the two men and appellant threatened to assault the coworker in the future. Given the imminent danger of working in the war theater, Mr. Allen recommended immediately returning appellant to the Red River Army Depot, noting that he did not hold appellant responsible for the action and that his early return to the United States was not based on any finding for or against him on the incidents alleged or his job performance. He noted that conditions in Iraq precluded the ability to provide proper conflict resolution among personnel.

Appellant submitted medical evidence regarding his hospitalization in Texarkana from July 25 to August 3, 2004 under the care of Dr. Chester W. Jenkins, a psychiatrist. He was released to return to work on August 3, 2004. The discharge summary listed a diagnosis of post-traumatic stress disorder. Appellant was admitted for treatment of sleep disturbance, weight loss and ruminative thoughts about his experiences in Iraq. Dr. Jenkins noted that appellant was previously treated for depression in 1999 after a tour of duty in Bosnia. In a June 27, 2004 report, he noted that appellant "was recently deployed back to the states from his tour in Iraq on

July 15, 2004." Appellant related that he "was subject of some racial problems while he was on tour in Iraq."

In an August 26, 2004 letter, the employing establishment controverted appellant's claim. Jeanne M. Bragg, an injury compensation administrator, noted that appellant had retired in 2000 with 17 years of military service. Appellant was hired on February 17, 2004 as a heavy equipment mechanic and, shortly after that he entered duty, volunteered for temporary duty in Iraq and was deployed on March 28, 2004. After a few days at camp, appellant alleged racial statements and harassment by coworkers until May 2004 when he indicated that it had ceased. Ms. Bragg noted that appellant filed an EEO complaint that was still pending investigation. She noted that appellant had a prior history of depression following his tour of duty in Bosnia. Ms. Bragg advised that an investigation was made and the employee involved in allegedly making a racially derogatory statement was counseled and relocated to a different workstation. However, appellant did not find this acceptable and did not feel secure. Ms. Bragg noted that, with regard to the alleged profanity on the workbench, the employing establishment stated that it had been there before appellant arrived. Appellant was returned stateside "[d]ue to continuous efforts to accommodate him, his inability to cooperate with personnel and the already stressful conditions and overall danger of environmental conditions."

By decision dated February 9, 2005, the Office denied appellant's claim on the basis that he failed to establish any compensable factors of employment.

On March 22, 2005 appellant requested reconsideration. He attributed his condition to a hostile work environment, long work hours, hot temperature and daily rocket and mortar fire. In a March 9, 2005 note, Dr. Jenkins stated: "[Appellant] reports that his [PTSD] began while working 18 [to] 24 hour days in temperatures ranging from 115 [to] 134 degrees. He states that his difficulties are work related."

In a letter dated May 4, 2005, Ms. Bragg noted that the stressful working conditions referenced by appellant were "created by him and other employees who allegedly made racial comments/statements." She noted that employees were relocated in an effort to allow appellant to work in a hostile free environment and that his EEO complaint was still pending. Ms. Bragg stated that appellant was required to work under excessive temperatures and perform overtime, averaging 58.58 hours per week during the period April 4 to July 24, 2004.

By letter dated May 19, 2005, the Office requested that Dr. Jenkins provide an opinion as to the cause of appellant's condition. It attached a statement of accepted facts which described appellant's work duties as a heavy mobile equipment mechanic. The Office accepted that appellant worked in conditions where the heat was in excess of 115 degrees and that he performed overtime work. It did not accept that employees working around appellant made racial comments or statements or that he was almost struck by a Humvee as he was exiting his vehicle. Dr. Jenkins did not respond to the Office's inquiry.

By decision dated July 6, 2005, the Office modified the prior denial to find that appellant established that he was required to work as a mechanic in conditions where the heat was between 115 to 130 degrees and that he worked more than 8 hours a day, at an average of 58.58 hours per week for the 16 weeks that he worked in Iraq. The Office did not accept that coworkers made

racial comments or statements or that he was almost struck by a Humvee driven by a coworker. The Office denied appellant's claim finding that there was no response from his treating physician addressing causal relation.

On August 22, 2005 appellant requested reconsideration and submitted additional medical evidence. In an August 23, 2005 report, Dr. Jenkins stated that appellant was initially treated in his clinic on August 13, 2004 after being discharged from an inpatient psychiatric hospital for treatment of PTSD. At the time of admission, appellant had experienced sleep disturbance, weight loss, anger and ruminative thoughts about his experiences in Iraq. His only reported prior treatment was for depression in 1999 after returning from a tour of duty in Bosnia. Dr. Jenkins stated that appellant continued to experience episodic anger and impulsivity and was compliant with his medication. He noted that appellant reported that his condition began while working 18 to 24 hour days in excessive temperatures in Iraq and appellant stated that his difficulties were work related.

In a November 17, 2005 decision, the Office denied modification of the July 6, 2005 decision. The Office found that the report of Dr. Jenkins was insufficient to establish causal relationship because the physician merely reiterated appellant's belief that his emotional condition was employment related.

On December 7, 2005 appellant requested reconsideration and submitted affidavits from Charles Keels, Darrell Banks, Barbara Richards, Joyce Wilson Porter and Carolene W. Noble. He also submitted a January 24, 2006 letter from Dr. Jenkins who noted that he had reviewed the affidavits submitted by appellant, noting that these individuals described him as active, animated and personable prior to his work in Iraq in 2004. After his return, appellant was described as withdrawn, disinterested and easily agitated. Dr. Jenkins stated: "I must therefore conclude that his manifestations of [PTSD] developed while he was in Iraq and as a result of experiences he had there."

In a February 8, 2006 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence was irrelevant and insufficient to warrant further merit review.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are distinctions as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act.[2] 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 hold a particular position.[3] Disabling

[2] *See Brenda L. Dubuque*, 55 ECAB 212 (2004); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *See Clara T. Norga*, 46 ECAB 473 (1995); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

conditions arising from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[4] In such cases, the feelings are considered to be self-generated.

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[5] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[6] Rather, the issue is whether the claimant has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[7] The Board has recognized the compensability of verbal altercations or abuse under certain circumstances; however, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[8]

A claimant's burden of proof is not discharged by the fact that he established employment factors that may give rise to a compensability disability under the Act. To establish an occupational disease claim for an emotional condition, the claimant must also submit probative medical evidence establishing that his emotional disorder was caused or contributed to by the accepted employment factors.[9] Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[10] Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the established employment factors.[11] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors.[12] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[13]

---

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

[5] *Robert G. Burns*, 57 ECAB ___ (Docket No. 06-380, issued June 26, 2006).

[6] *Ronald K. Jablanski*, 56 ECAB ___ (Docket No. 05-482, issued July 13, 2005)

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

[8] *See Dennis J. Balogh*, 52 ECAB 232 (2001); *Robert Knoke*, 51 ECAB 319 (2000).

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

[10] *David Apgar*, 57 ECAB ___ (Docket No. 05-1249, issued October 13, 2005); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[11] *See Beverly R. Jones*, 55 ECAB 411 (2004).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[13] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ANALYSIS

The Office accepted as compensable factors that appellant worked in Iraq while exposed to extremes in temperature and that he was required to work more than eight hours a day. The evidence of record reflects that appellant was exposed to heat in excess of 115 degrees and that his work averaged 58.58 hours per week while he was in Iraq on temporary detail. These factors were properly found compensable under *Cutler*. The Office found that appellant did not establish as compensable his allegations concerning comments made by certain coworkers, material written on a workbench located next to his workstation, that he was threatened by a coworker driving a Humvee or his dissatisfaction with how his complaints were handled by his superiors.

Appellant generally alleged harassment due to racial comments and profanity written on a workbench by coworkers. The Board, however, finds that he has submitted insufficient evidence to establish that he was harassed as alleged. According to the employing establishment, the profanity on the workbench had been written prior to appellant's detail to work at the camp and he did not establish that the writing was directed towards him. Appellant did not submit sufficient evidence regarding the alleged April 10, 2004 comments made by Mr. Strain. The employing establishment noted that interviews had been conducted and summarized the content of the interviews with the individuals involved. Mr. Strain denied making any race-based comments to appellant, although he did acknowledge the use of an inappropriate racial epithet while telling a story.[14] The record indicates that Mr. Strain was subsequently removed from the location in which appellant worked. However, such remedial action does not of itself establish error or abuse by the employing establishment in investigating the matter. As to the May 6, 2004 incident where appellant was called over by Mr. Lake, the coworker also denied making any racial comment to appellant. Similarly, the evidence of record does not establish that any comment of Mr. Britt rose to the level of verbal abuse. Although appellant filed an EEO complaint based on these incidents; an EEO complaint by itself, does not establish that workplace harassment or unfair treatment occurred as alleged.[15] The case record before the Board does not include any final EEO decision on appellant's complaint. The issue is not whether the claimant has established harassment or discrimination under standards administered by the EEO Commission. Rather, the issue is whether he has submitted sufficient evidence to establish a factual basis for his allegations with probative and reliable evidence.[16] In this case, appellant has submitted insufficient evidence to establish that coworkers verbally harassed him, as alleged.

As to the May 30, 2004 incident with the motor vehicle, Mr. Tuft stated that a military vehicle drove up and stopped at appellant's door while he was getting out. However, he noted

[14] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that an employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

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

[16] *Ronald K. Jablanski*, *supra* note 6.

that he did not see who was driving the vehicle and did not know whether the action was intentional. The evidence as to this incident is not sufficient to establish harassment of appellant by his coworkers.

As noted, two factors were found compensable by the Office. Therefore, the medical evidence must be analyzed.[17]

Dr. Jenkins diagnosed PTSD and noted that appellant had recently returned from deployment in Iraq. In a June 27, 2004 report, he reported that appellant related that he had been subjected to "some racial problems while he was on tour in Iraq." In an August 2, 2004 discharge summary, Dr. Jenkins noted that appellant had previously been treated for depression following his 1999 Bosnia tour of duty. In a March 9, 2005 note, he stated: "[Appellant] reports that his [PTSD] began while working 18 [to] 24 hour days in temperatures range from 115 [to] 134 degrees." Dr. Jenkins related that appellant attributed his PTSD to his working 18 to 24 hours per day and the extreme heat in Iraq. The Board finds that his reports, while supportive of appellant's claim, are insufficient to meet appellant's burden of proof to establish that his emotional condition was caused by the two accepted factors of employment. Dr. Jenkins' reports are based, initially, on a statement of causal relationship as related by appellant. His opinion reflects that appellant felt his PTSD was due to the extreme heat, working 18 to 24 hours per day and begin the subject of some racial problems while stationed in Iraq. Dr. Jenkins did not provide a comprehensive report reviewing a full medical history, apart from noting generally that appellant had previously treated for depression while in the military after his return from Bosnia, or list the results of any diagnostic or mental status examination. He did not explain from a medical perspective the nature of the causal relationship between appellant's diagnosed condition and the accepted employment factors. Dr. Jenkins did not support his opinion with sufficient medical reasoning to demonstrate that his stated conclusion was sound, logical and rational.[18] His reports are therefore inadequate to establish the critical element of causal relationship.[19] The Board finds that appellant has not submitted sufficient probative medical evidence to discharge his burden of proof.

[17] *See Dennis J. Balogh*, *supra* note 8.

[18] *See John W. Montoya*, 54 ECAB 306 (2003).

[19] *Beverly R. Jones*, *supra* note 11.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS -- ISSUE 2

Appellant's December 7, 2005 request for reconsideration did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. On reconsideration, appellant submitted affidavits from various individuals commenting on his activities and interests prior to his work in Iraq and a report by Dr. Jenkins.

The affidavits of Mr. Keels, Mr. Banks, Ms. Richards, Ms. Porter and Ms. Noble are not relevant to the underlying issue in this case. As noted, the Office accepted that appellant was required to work in conditions where the heat exceeded 115 degrees and that he worked more than 8 hours a day, with an average of 58.58 hours per week for the 16 weeks he worked in Iraq. The various affidavits are not from individuals who were present with appellant while deployed in Iraq or who otherwise were witnesses to any of the alleged incidents of harassment or verbal abuse.

In a January 24, 2006 letter, Dr. Jenkins noted that he had reviewed the affidavits and that the individuals all noted a change in appellant's manner subsequent to his return from Iraq. He stated that he "must therefore conclude that his manifestations of PTSD developed while he was in Iraq and as a result of his experiences he had there." Dr. Jenkins did not describe the accepted employment conditions of working in extreme heat and working 18 to 24 hours per day or explain how the accepted employment factors caused or aggravated appellant's diagnosed condition. This evidence did not constitute relevant evidence not previously considered by the Office as it did not address the underlying issue of causal relation.

The Board finds that the Office properly determined that appellant was not entitled to further review of the merits of his claim pursuant to section 10.606(b)(2) and properly denied his December 7, 2005 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2006 and November 17, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: June 14, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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