United States Department of Labor
Employees' Compensation Appeals Board

F.O., Appellant	)	
and	)	**Docket No. 06-1626**
	)	**Issued: June 26, 2007**
DEPARTMENT OF THE AIR FORCE, ALASKA NATIONAL GUARD, Fort Richardson, AK, Employer	)	

Appearances:
John E Goodwin, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument November 8, 2006

DECISION AND ORDER

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

JURISDICTION

On July 11, 2006 appellant filed a timely appeal from a January 23, 2006 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether appellant sustained an emotional condition causally related to factors of his federal civilian employment. On appeal, he contends that there is a sufficient relationship between his military duties and his civilian employment to establish that his emotional condition arose while in the performance of duty.

FACTUAL HISTORY

On December 10, 2003 appellant, then a 50-year-old employee relations specialist, filed an occupational disease claim alleging that he developed an emotional condition due to his

federal employment. Appellant described as occupational stressors his "protective communications and subsequent withdrawal of [f]ederal recognition." He first became aware of his condition in November 1997 and realized it was caused or aggravated by his employment on November 13, 2003. Appellant stopped work on November 10, 2003 and has not returned.[1] Lieutenant Colonel Catherine Jorgensen, appellant's supervisor, noted that the employing establishment controverted the claim.

The record reflects that, beginning in 1993 and through 1996, while a Major in the Alaska Air National Guard, appellant filed several complaints alleging waste, fraud and abuse on the part of senior military officers. He alleged that his communications concerning these allegations were protected and that he had experienced reprisal. Appellant noted that he was not selected for a civil service position with the National Guard in 1996; notified on February 28, 1997 that he was being processed for an administrative discharge from the military; and on March 7, 1997 advised that his security clearance was being suspended. The matter was forwarded to the Inspector General of the Air Force, who conducted an investigation as reflected in the August 18, 1997 report of Colonel Martin D. Carpenter. The report determined that misuse of government funds by senior military officers had been substantiated from investigations initiated by appellant and others. Colonel Carpenter found that the record did not demonstrate poor duty performance or documented moral or professional dereliction on the part of appellant such that the proposed separation action and suspension of his security clearance were "obvious reprisal for his negative comments about Alaska National Guard leadership."

In an affidavit of record, appellant noted that his security clearance was reinstated in February 1998. He advised that the Director of the Air Force Review Board ordered correction to his military records, including expunging performance evaluations conducted from 1995 through 1998 and that appellant be transferred to the Air Force Reserves and considered for a promotion. Appellant explained that during the period his security clearance was suspended, he completed those work tasks assigned that did not require a clearance. He stated that it became obvious that the military was not going to take action against senior leadership and he pursued a separate complaint in District Court. On June 20, 2000 the Department of Air Force Review Boards Agency directed the correction of appellant's military records pertaining to "actions in 1997 to withdraw his [f]ederal recognition, discharge him from the Alaska Air National Guard, and to suspend his security clearance." Appellant was assigned to the grade of Lieutenant Colonel and it was noted that he should be transferred to the Air Force Reserve.

In a May 14, 2004 letter, the Office advised appellant that the evidence of record was insufficient to determine his eligibility for benefits under the Federal Employees' Compensation Act. Appellant was directed to provide additional factual evidence pertaining to his allegations, noting whether they arose from his military or civilian duties and a rationalized report from a physician discussing the cause of his emotional condition as it pertained to work and nonwork stressors. The Office also requested additional evidence from the employing establishment.

[1] In a December 9, 2003 report, Dr. David E. Telford, a psychiatrist, noted that appellant was hospitalized from November 14 to 20, 2003 for treatment of an anxiety disorder. He recommended that appellant not return to work and seek an early retirement.

In a letter dated June 9, 2004, Colonel Deborah C. McManus, a human resources officer, controverted appellant's claim on behalf of the employing establishment. She asserted that events related to appellant's military status had been rectified and there was no evidence of a hostile work environment in his full-time civilian technician status. Colonel McManus stated that after appellant was reassigned to human resources on September 7, 2003 progressive disciplinary measures were in order based on his unscheduled and unexcused absences. From September 7 through December 11, 2003 unscheduled leave was approved until appellant's sick and annual leave balances were exhausted. He was extended 12 weeks of family and medical leave pending submission of medical documentation. However, the evidence submitted from a physician merely explained a five-day absence from November 14 to 20, 2003. Appellant was assigned a dedicated trainer, but was repeatedly unavailable for training sessions. He advised Colonel McManus on February 11, 2004 that he would not be returning. Colonel McManus noted that appellant had not been to work since November 10, 2003, but the agency had delayed any adverse personnel action pending receipt of his disability retirement application.

In a June 17, 2004 letter to the Office, appellant noted that he was still an employee of the Alaska Air National Guard and that he had a case pending before the Air Force Board for Correction of Military Records "to resolve issues that have come about due to the Hostile Working Environment from the Military Side." He also provided a September 10, 2001 fitness-for-duty evaluation, personnel forms from January 7, 1996 to January 11, 2004 noting his position title and number, memoranda dated June 20, 2000, April 30, 2001 and April 7, 2004, a December 8, 2003 report from Geraldine H. Ferry of Emmanuel Christian Counseling and medical evidence from Dr. Samuel Schurig, an osteopath and flight surgeon.

In a September 22, 2004 decision, the Office found that appellant did not establish that he sustained an emotional condition arising in the performance of duty. It noted that appellant was employed in a dual capacity as a member of the military and as civilian employee. The Office found that the withdrawal of federal recognition concerned appellant's status as a military officer and his protected communications were shown to concern military personnel not directly connected to his civilian position. While appellant experienced reprisal because of his whistle-blowing communications, this pertained to his military career and function as demonstrated by the withdrawal of federal recognition and suspension of his security clearance. The Office found that appellant did not provide examples of a hostile work environment arising in his civilian employment.

On October 6, 2004 appellant requested an oral hearing which was held on October 20, 2005. He testified that his supervisor, Colonel Danny Nice, moved him from his position as an administrative officer to a logistics officer on July 7, 1996. Appellant identified Colonel Nice as an individual involved in appellant's whistle-blowing activities. He contended that the whistle blowing involved both his military and civilian employment as he performed the same positions, as an administrative officer, management analyst and logistics specialist, in both his civilian and military employment. Appellant advised that he had the same supervisors in these positions. He noted that five days a week were spent working as a civilian employee and two days a month were spent in his military position. Appellant stated that his security clearance was taken on March 7, 1997 while in a civilian status. Although he was named as the installation mobility officer, appellant stated that the employing establishment did not make any accommodations for the activities related to his security clearance. These included looking at

classified war plans, checking hazardous cargo and verifying classified documents. Appellant noted that he prepared a monthly report which dealt with unclassified information.

Appellant alleged that General Ken Taylor gave three briefings in the fall of 1996, one for the enlisted troops, one for the officers and one for the technicians and had mentioned appellant as an example of somebody who was unethical, lacked professionalism and exhibited behavior unbecoming of an officer. Colonel Larson identified appellant to others and said he was going to be fired for unethical behavior. Appellant indicated that he was the only Major meeting with the Withdrawal of Federal Recognition Board, a local board with jurisdiction over the Alaska Air Guard, at the time. Appellant's attorney contended that appellant's security clearance was improperly suspended, he was improperly reassigned from administrative officer to logistic officer and he sustained stress from not being able to perform his assigned duties as a logistic officer without a security clearance.

By decision dated January 23, 2006, an Office hearing representative affirmed the September 22, 2004 decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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 of workers compensation. 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 Federal Employees' Compensation 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 to hold a particular position.[3]

Administrative and personnel matters, although related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not generally covered under the Act.[4] However, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage may be afforded.[5] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[6]

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[2] *See, Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[4] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[5] *See William H. Fortner*, 49 ECAB 324 (1998).

[6] *Ruth S. Johnson*, 46 ECAB 237 (1994).

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[7] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[8] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[9] The primary reason for requiring factual evidence from the claimant in support of his or her 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.[10]

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.[11] 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.[12]

ANALYSIS

Appellant attributed his stress to protected communications (whistle-blowing activities) resulting in harassment and retaliatory actions, including the improper suspension of his security clearance in 1997. The harassment occurred, he alleged, following charges of waste, fraud and abuse against several senior military officers in the Alaska Air National Guard. Appellant alleged that his reassignment to the logistic officer position and the removal of his security clearance caused fear and anxiety about his ability to perform his job.

An August 18, 1997 investigative report verified that appellant's military employer erred in suspending his security clearance and that the suspension of his security clearance caused

[7] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[8] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

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

[11] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[12] *Id.*

problems as appellant no longer had access to classified material and was unable to participate in periodic exercises. However, as appellant was employed in dual capacity as a military and civilian federal employee, he must establish a relationship between the alleged incidents and his civilian federal employment to bring it under the coverage of the Act. The record reflects that in 1998, the Department of the Air Force took action to correct appellant's military records pertaining to the withdrawal of his federal recognition in 1997 and the suspension of his military security clearance. The military review board also directed consideration of appellant's promotion which he subsequently received.

With his claim filed in 2003, appellant has premised his contention for coverage under the Act to the actions taken in the military during the period 1993 to 2000. In claims arising from individuals employed in a dual capacity while in the military reserves, the Board has carefully distinguished those claims giving rise based on the individual's military status from those pertaining to his or her civilian job duties. In *Patrick O'Hara*,[13] the claimant fractured his right wrist while on annual active duty in the Army reserve. The Board held that he was not injured while in the performance of duty under the Act, as his injury while on active duty had an insufficient relation to the performance of his federal civilian duties. In *Jerry C. Gilliam*,[14] the claimant filed a claim for an emotional condition after being discharged by the National Guard for exceeding weight standards. The Board denied the claim, noting that the weight requirement was solely imposed by his military employment such that his resulting emotional condition did not have a sufficient relationship to the performance of his civilian duties.[15] In *Evelyn Kay Cavness (Jimmy L. Cavness)*,[16] the Board denied a widow's claim for death benefits. It found that the employee's death on February 25, 1986 was causally related to a June 22, 1984 myocardial infarction which arose while he was in the line of duty on an active-duty training mission.

The origin of appellant's work stressors while in military service are highlighted by his June 17, 2004 letter to the Office. He noted that he was still an employee of the Alaska Air National Guard and that he had a case pending before the Air Force Board for Correction of Military Records "to resolve issues that have come about due to the Hostile Working Environment from the Military Side." On appeal, appellant contends that the facts of his claim are similar to those arising in *James M. Frandle*.[17] In *Frandle*, the employee attributed his heart attack to both his civilian and National Guard positions as a vehicle maintenance mechanic. The Board found that the record established a sufficient relationship between the claimant's weekend military duties and his civilian employment that the events occurring on the weekend became a condition of his civilian employment. The Board distinguished the weight requirement in *Gilliam*, which was required solely by the military employer, from the functions the claimant

[13] 34 ECAB 493 (1982).

[14] 39 ECAB 1003 (1988).

[15] *Id*. The Board also found against the claimant's allegations that he was harassed by his civilian supervisors and coworkers.

[16] 40 ECAB 1016 (1989).

[17] Docket No. 94-419 (issued September 10, 1996).

performed in both his military and civilian employment in the operation of the vehicle maintenance shop. Unlike the claimant in *Frandle*, the matters giving rise to the harassment and hostile work environment claimed by appellant began with his complaint, among others of financial waste, fraud and abuse on the part of senior military officers serving in the Alaska Air National Guard. Actions were taken by military superiors during 1997 impacting his status in the military, including the temporary suspension of his security clearance and military performance appraisals. Appellant sought remedy before the Air Force review boards, seeking a correction of the performance appraisals, the return of his security clearance and withdrawal of federal recognition.[18] The Board finds that his emotional condition did not arise out of and in the course of his civilian federal employment.

Appellant also attributed his stress to administrative actions of the employing establishment including, improper reassignment to the logistics officer position and the failure to provide training. He also alleged that he should have been upgraded to a GS-12 position. However, appellant did not establish by the submission of probative evidence a factual basis for these allegations.[19] Without factual evidence to substantiate error or abuse, the factors to which appellant attributes his condition are not compensable.

CONCLUSION

The Board finds that appellant has not met his burden of proof of establishing that his emotional condition arose out of the course of his civilian federal employment.

[18] As noted in *Cavness*, *supra* note 16, no claim for disability under the Act was made by appellant during the period in which these actions were taken.

[19] *Bobbie D. Daly*, 53 ECAB 691 (2002).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 26, 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