

**United States Department of Labor
Employees' Compensation Appeals Board**

C.R., (a.k.a. C.A.), Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Albany, NY, Employer)

**Docket No. 07-1306
Issued: September 25, 2007**

Appearances:
Appellant, pro se
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 April 16, 2007 appellant filed a timely appeal from December 22, 2006 and April 5, 2007 merit decisions of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On December 23, 2004 appellant, then a 51-year-old program support assistant, filed an occupational disease claim alleging that he sustained stress and depression due to an excessive workload and lack of supervisory support. He stopped work on November 16, 2004.

In a statement dated November 23, 2004, appellant noted that he began working in his position in December 2002. His position required “an enormous amount of work and attention to detail.” Appellant stated:

“Many times on this job you were forced to work late evenings and come in on the weekends to maintain or catch up with the work. During the work shift, you were pressured to meet the needs of the patients, in getting their information copied from their medical record files. In the midst of this, there were telephone calls for requests, incoming faxed requests, incoming regular mail requests and emergency phone consents. In addition to that, you have patients walking in the office to request their records. Many times while I was engaged in these activities I continued to be troubled by headaches, anxiety and deep stress. During the past 23 months I applied for other jobs, meeting all of the qualifications and the interview process, but did not receive a job offer.”

Susan M. Smith, a supervisor, twice notified appellant that he made multiple mistakes, including failing to assist patients and maintain confidentiality. Appellant asserted that management did not counsel him at the time of the alleged incidents and that he felt he was discriminated against based on race.

On March 4, 2005 the employing establishment controverted appellant’s claim. The employing establishment submitted numerous reports of contact describing complaints.¹ On May 8, 2003 appellant received a proposed suspension for seven days for failing to maintain patient confidentiality and causing a processing delay. The employing establishment reduced the proposed suspension to a letter of alternative discipline. On October 22, 2004 appellant received a proposed 14-day suspension for making inappropriate comments, failing to follow instructions and failing to maintain confidentiality.

In a statement dated January 12, 2005, Ms. Smith related that she did not instruct appellant to work on weekends and evenings. She stated: “I came into the office on August 1, 2004 and found [appellant] working at his desk. I told him that he had no prior authorization to be in the building working. [Appellant] was to stop what he was doing and leave.” Ms. Smith asserted that appellant worked a total of eight hours overtime in 2003. She confirmed that the position was “very busy and does require that the employee pay attention to detail. The employee is expected to display responsibility for the type of work that is accomplished.” Ms. Smith disagreed with appellant’s allegation of racial bias. She noted that he began using leave after he received the proposed 14-day suspension.

On October 13, 2005 the Office requested additional factual and medical information from appellant in support of his claim.

By decision dated November 15, 2005, the Office denied his claim on the grounds that he did not establish an emotional condition in the performance of duty. The Office found that appellant had not established any compensable employment factors.

¹ The names on the majority of the reports of contact have been redacted.

In a statement dated November 4, 2005, received by the Office on January 20, 2006, appellant requested reconsideration of his claim. He related that after working two months in his current position he began experiencing tension headaches due to the pressure of the job and frustration from not being able to “catch up and keep up with the work.” Appellant maintained that Helen Cross, a coworker, could verify that he had to work late and on Sundays. After Ms. Smith told him that he could not work on Sunday, he “became more frustrated and depressed.” He was unable to obtain another position which worsened his depression. Appellant stated:

“My depression and tension became more dramatic when I kept trying to do a good job but kept making errors. I had to meet deadlines on a daily basis because people needed their records for court cases and disability claims.... Many times people would walk in demanding to have large files of paper charts of medical notes copied by the next day and you would already be working on someone else’s records, copying them. This caused a lot of late evening work because of the high volume copying of paper medical charts, running them off a copier manually.”

Appellant asserted that he received little assistance from management and noted that patients made numerous complaints about the time it took to receive their records. He attributed his condition to the high pressures of his job.² On June 2, 2005 appellant resigned from the employing establishment effective June 3, 2005.

By decision dated December 22, 2006, the Office denied modification of its November 15, 2005 decision.

Appellant again requested reconsideration on January 14, 2007. He submitted a letter dated January 7, 2005 from the employing establishment to a physician regarding his request for reasonable accommodation. Appellant filed a complaint of employment discrimination on May 3, 2005 because he was denied reasonable accommodation. He submitted unsigned statements dated January 11, 2007 from Ms. Cross and Robert Schmidbauer, a coworker, who responded “yes” that the work was excessive and required overtime. On February 28, 2007 the employing establishment related that Ms. Cross denied completing the January 11, 2007 statement and noted that Mr. Schmidbauer was on military leave.³ The employing establishment indicated that it could not find positions available to accommodate appellant’s restrictions of “a no-stress environment with no reduction in pay” and thus denied his requests for reasonable accommodation. Appellant received a June 1, 2005 proposed removal letter for altering medical documentation to change his return to work date from February to May 2005.

² Appellant submitted medical evidence regarding his emotional condition.

³ Ms. Cross provided a February 23, 2007 statement denying that she wrote a statement on behalf of appellant.

In a decision dated April 5, 2007, the Office denied modification of its December 22, 2006 decision.⁴

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.⁵ 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.⁶

Administrative and personnel matters, although generally 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 covered under the Act.⁷ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁸ 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.⁹

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.¹⁰ 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.¹¹ The issue is whether the claimant has

⁴ The Office incorrectly cited to clear evidence of error language, which is the standard relevant to untimely requests for reconsideration. See 20 C.F.R. § 10.607. This error is harmless, however, as the Office weighed the evidence submitted on reconsideration and denied modification of its prior decision.

⁵ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁷ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁸ See *William H. Fortner*, 49 ECAB 324 (1998).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁰ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹¹ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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.¹² The primary reason for requiring factual evidence from the claimant is 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.¹³

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.¹⁴ 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.¹⁵

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant attributed his condition, in part, to racial discrimination by his supervisors. He argued that management did not discuss unsatisfactory incidents at the time of their occurrence but instead waited a lengthy period before counseling him about his job performance. If disputes and incidents alleged as constitutes harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his regular duties, these could constitute employment factors.¹⁶ The evidence, however, must establish that the incidents of harassment and discrimination occurred as alleged.¹⁷ Appellant has submitted no evidence corroborating his allegation that the manner in which management counseled him regarding his job performance was discriminatory in nature. Thus, he has not established a compensable employment factor.

¹² See *James E. Norris*, 52 ECAB 93 (2000).

¹³ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁵ *Id.*

¹⁶ *Janice I. Moore*, 53 ECAB 777 (2002).

¹⁷ *Id.*

Regarding disciplinary action by the employing establishment, the Board notes that disciplinary actions are administrative functions of the employer and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, not compensable employment factors.¹⁸ Appellant received a May 8, 2003 proposed suspension for seven days for failing to maintain patient confidentiality and causing a processing delay. The suspension was subsequently reduced to a letter of alternative discipline. The mere fact that the employing establishment lessens or reduces a disciplinary action does not establish that it acted in an abusive manner towards the employee.¹⁹ On October 22, 2004 appellant received a proposed 14-day suspension for making inappropriate comments, failing to follow instructions and failing to maintain confidentiality. He has not submitted any evidence showing that the disciplinary action taken by management was erroneous or abusive and thus has not established a compensable employment factor with respect to the disciplinary action taken by the employing establishment.

Appellant further contended that he was unable to obtain another position and the employing establishment failed to provide him with reasonable accommodation. The Board has held, however, that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve an employee's ability to perform his regular or specially-assigned duties but rather constitute a desire to work in a different position.²⁰

Appellant primarily attributed his stress to the performance of his job requirements. He alleged that he sustained stress trying to "meet the needs of the patients" by copying information from medical record files and responded to records requests made by telephone, facsimile, mail and in person. Appellant made errors attempting to meet his deadlines. He noted that the patients often needed records for court cases and disability claims. Appellant maintained that he worked long hours and on Sundays attempting to manage his workload. Ms. Smith, a supervisor, confirmed that his position was very busy and required that the employee pay attention to detail. She also related that she encountered him at the office working on a weekend and told him to go home. The employing establishment further submitted documents supporting that appellant made numerous mistakes in the performance of his duties.

Appellant's emotional reaction to attempting to meet the requirements of his position constitutes a compensable employment factor. The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements constitutes a covered employment factor under the Act.²¹ Appellant's job duties consisted of responding to requests for records from patients in a timely manner and he attributed his stress directly to the performance of his employment duties. The Board has long held that where a claimed disability results from an employee's emotional reaction to his regular or specially-assigned duties or to an

¹⁸ See *Lori A. Facey*, 55 ECAB 217 (2004).

¹⁹ See *Linda K. Mitchell*, 54 ECAB 748 (2003).

²⁰ See *Charles D. Edwards*, *supra* note 11.

²¹ *Trudy A. Scott*, 52 ECAB 309 (2001).

imposed employment requirement, the disability comes within the coverage of the Act.²² Therefore, appellant has identified a compensable employment factors under *Cutler*.²³

As appellant attributed his emotional condition to the performance of his regular or specially-assigned work duties, the case presents a medical question regarding whether his emotional condition resulted from the compensable employment factors. The case, therefore, must base its decision on an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.²⁴ After such further development as deemed necessary, the Office should issue a *de novo* decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.

²² *Penelope C. Owens*, 54 ECAB 684 (2003); *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

²³ See *Lillian Cutler*, *supra* note 5.

²⁴ See *Robert Bartlett*, *supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 5, 2007 and December 22, 2006 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 25, 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