

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

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C.E., Appellant )

and )

**DEPARTMENT OF JUSTICE, FEDERAL  
BUREAU OF INVESTIGATION,  
Indianapolis, IN, Employer** )

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**Docket No. 07-2261  
Issued: November 24, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 5, 2007 appellant filed a timely appeal from a December 28, 2006 merit decision of the Office of Workers' Compensation Programs and a June 12, 2007 hearing representative's decision 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.

**ISSUES**

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied his request for subpoenas.

**FACTUAL HISTORY**

This case has previously been before the Board. In a June 29, 2004 order, the Board instructed the Office to obtain relevant evidence regarding appellant's allegations from the

employing establishment.<sup>1</sup> The Office requested the evidence but the employing establishment did not provide the information, citing difficulties obtaining records. On September 25, 2006 the Board set aside a November 16, 2005 decision denying appellant's emotional condition claim. The Board considered his allegations that a shot was fired into his house at his children on March 8, 1978 as a result of an investigation he was conducting in the course of his federal employment; that his performance appraisal was unfairly downgraded, and that he was continuously interrogated by the employing establishment from March 8 to June 28, 1978 in connection with an investigation. The Board found that appellant had not established as factual that shots were fired into his house as a result of an investigation he conducted as part of his employment. The Board further found that he had not established that his performance appraisal was erroneously downgraded. The Board determined, however, that the Office should obtain a response from the employing establishment to appellant's allegations that he was interrogated from March 8 to June 28, 1978 by agents with the employing establishment and the DOJ. The Board remanded the case for the Office to obtain reports from the Office of Professional Responsibility (OPR) of the employing establishment and the DOJ regarding a 1978 investigation and copies of all other relevant evidence in its possession. The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference.

On remand, the Office requested that the employing establishment and the DOJ provide all records relevant to a 1978 OPR investigation. On December 4, 2006 the employing establishment submitted some of the records relevant to the OPR's 1978 investigation. In an accompanying November 30, 2006 letter, it maintained that it was enclosing "all known records regarding the [OPR] investigation concerning [appellant]." The employing establishment noted that the records were "voluminous" as it was investigating multiple incidents including possible misuse of a vehicle, the use of profanity and lost and missing property. It noted that Mr. Shapiro, an OPR attorney, found no evidence of criminal conduct on the part of any employee. The employing establishment also indicated that OPR considered appellant's allegation regarding his performance appraisal and found no wrongdoing. It maintained that appellant may have leaked information to the news media. The employing establishment concluded that no independent body found any evidence of error or abuse in any administrative action taken.

The evidence submitted by the employing establishment indicates that, on April 12, 1978, appellant was transferred to Chicago, IL as he had lost effectiveness in his current location. He requested a hardship exemption. On May 1, 1978 the employing establishment suspended appellant for five days for an insubordinate attitude toward his supervisor, failing to obtain proper authorization for leave and failing to properly control employing establishment property.

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<sup>1</sup> Order Remanding Case, Docket No. 04-961 (issued June 29, 2004). On March 26, 2001 appellant, then a 57-year-old former special agent, filed an occupational disease claim alleging that he sustained major depression and post-traumatic stress disorder due to employment factors. He was removed from employment on June 28, 1978 when he refused a transfer. Appellant attributed his emotional condition, in part, to a 1978 investigation conducted by the employing establishment and the Department of Justice (DOJ).

On May 4, 1978 Joseph F. Gross, Jr., an assistant counsel with the OPR, discussed the administrative action taken against appellant. He stated:

“I advised you [the employing establishment’s OPR] that, after examining both [appellant’s] statement and the pertinent [employing establishment] files, further delay in taking administrative action was not warranted. At the same time, I expressed concern that several bases for the action seemed trivial, if not unreasonable, and could only fuel one’s belief that the [employing establishment] was retaliating against [appellant]. As examples, I pointed out the charges that [he] did not obtain proper authorization for annual leave when his house was shot at with his children alone inside; that he lost a brief case; and, that he did not properly check-out a walkie talkie.”

In a June 19, 1978 report, Assistant Director Lee Colwell interviewed appellant and his attorney regarding charges of mistreatment by employing establishment officials.<sup>2</sup> Appellant contended that the charges brought against him were “trivial.” Mr. Colwell noted that Special Agent in Charge Harlan C. Phillips provided examples of appellant’s inappropriate behavior. Mr. Phillips maintained that appellant received an unsatisfactory performance rating from April 1, 1977 through May 1, 1978 because he failed to timely report the March 8, 1978 alleged shooting at his house, hung up the telephone on Mr. Phillips, used profanity in reference to the employing establishment, failed to obtain proper authorization for annual leave, failed to properly check out a walkie talkie and did not properly maintain an automobile log. Mr. Colwell also noted that Mr. Shapiro of the OPR for the DOJ investigated allegations that Mr. Naum testified on behalf of a police officer accused of corruption. Mr. Shapiro “advised that no violation of [f]ederal law existed and referred the matter to the [employing establishment] for administrative action, if any. The [employing establishment] took no administrative action against [Mr.] Naum.” The employing establishment transferred appellant to Chicago, IL. Appellant protested the transfer due to his family situation. Mr. Colwell related that Mr. Harmon, appellant’s supervisor, found that it was reasonable for appellant to call for annual leave on March 9, 1978 without obtaining permission of a supervisor given the circumstances. Mr. Harmon rated him as excellent for the period April 1, 1977 through March 31, 1978 but subsequently downgraded the evaluation to unsatisfactory. Mr. Colwell noted that on December 13, 1978 Mr. Naum questioned whether appellant was trying to get him in trouble by interviewing an informant. He stated:

“According to [appellant] [Mr.] Naum said something to the effect that anybody who would do that would be met in the alley with a baseball bat and hit in the kneecaps. During the [OPR] investigation, [Mr.] Naum signed a statement under oath denying this threat. However, when [Mr.] Phillips questioned [Mr.] Naum following the submission of [appellant’s] memorandum dated February 21, 1978, [Mr.] Naum admitted making such a comment but said he meant it only as a cliché.”

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<sup>2</sup> Mr. Colwell noted that Gary Shapiro with the OPR of the DOJ was investigating appellant’s allegations that the employing establishment failed to investigate the behavior of Special Agent Dean G. Naum.

Mr. Colwell recommended that appellant be transferred to Chicago immediately and that the employing establishment take no action on various unresolved issues, including the source of the press leak, whether appellant attended a basketball game during work hours and any potential leave abuses.

On June 22, 1978 the employing establishment denied appellant's request that he not be transferred due to family hardship. It found he had "lost his effectiveness" in his current work location. On July 31, 1978 the employing establishment terminated appellant's employment due to insubordination when he failed to report for duty in Chicago.

In a report dated October 3, 1978, Mr. Shapiro reviewed the employing establishment's investigation into appellant's allegations. He did not review the administrative proceedings brought against him by the employing establishment. Mr. Shapiro found that the OPR conducted a sufficient investigation and that there was no evidence of "criminal conduct on the part of an employee of the [employing establishment]."

By decision dated December 28, 2006, the Office denied appellant's emotional condition claim on the grounds that he did not establish an injury in the performance of duty. It found he had not established any compensable employment factors.

On January 24, 2007 appellant requested a review of the written record. He noted that the DOJ had not submitted an OPR report. Appellant also requested a subpoena for the employing establishment to produce his personnel files and the personnel file of Rex A. Rissen, a deceased coworker.

By letter dated March 31, 2007, appellant alleged that the employing establishment withheld information from its OPR report, including the report of the state police laboratory which determined that a bullet had been fired at his house. He contended that he had established that Mr. Naum threatened to break his kneecaps. Appellant discussed again the March 8, 1978 incident when his daughter called and reported a shooting at their home. He asserted that Mr. Phillips stopped the employing establishment's investigation of the March 8, 1978 incident. Mr. Phillips also failed to provide appellant's fitness-for-duty psychiatrist with appropriate information. Appellant noted that the shots were fired at his house and in five hours he secured the arrest of Edward Mode, who was previously investigated by Mr. Naum. He maintained that this established a link between the shooting of the windows of his home and employment factors.

On April 17, 2007 the hearing representative denied appellant's request for a subpoena. She noted that documents pertinent to his claim should be in his personnel documents and that he could request the personnel file of his deceased coworker from the employing establishment.

On May 11, 2007 the employing establishment asserted that the administrative actions described by appellant "have never been shown by a review board to be in error, abuse or retaliation." It further related that he had not provided any evidence regarding the alleged shot fired into his house to the employing establishment. In a May 26, 2007 response, appellant protested the denial of the subpoena. He related that he interviewed George Tomlinson who provided information about Mr. Naum. Following the interview, Mr. Naum told appellant that he was trying to get him in trouble and that anyone that did that 'would be met in the alley with a

baseball bat and hit in the kneecaps.” On March 8, 1978 appellant caused the arrest of Mafia gambling figure, Edward Mode, who had been ‘cleared’ of illegal activity by Agent Naum. Five hours after the arrest of Mr. Mode, someone attempted to murder the then 9- and 11-year old children of appellant by firing a gun shot at them through the front window of appellant’s residence. The employing establishment investigated the shooting until Mr. Phillips ordered the investigation to cease. Mr. Phillips instructed appellant to undergo a fitness-for-duty examination but failed to provide the psychiatrist with information about Mr. Naum’s threat and also failed to provide this information to the police department. Appellant noted that Mr. Phillips accused him of leaking information to the press but denied his requests to take a polygraph examination.

By decision dated June 12, 2007, the hearing representative affirmed the December 28, 2006 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>3</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>5</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 556 (1991).

<sup>6</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>7</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

Office regulations provide that an employer who has reason to disagree with an aspect of the claimant's report shall submit a statement to the Office that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support that position.<sup>14</sup> The applicable regulation further provides that the employer may include supporting documents such as witness statements, medical reports or records, or any other relevant

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<sup>8</sup> See *Michael Ewanichak*, 48 ECAB 364 (1997).

<sup>9</sup> See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

<sup>10</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>11</sup> *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>12</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>13</sup> *Id.*

<sup>14</sup> 20 C.F.R. § 10.117(a).

information.<sup>15</sup> If the employer does not adequately respond to requests for comments on a claimant's allegations, the Office may accept the claimant's allegations as factual.<sup>16</sup>

### **ANALYSIS -- ISSUE 1**

The Board previously found that appellant had not submitted sufficient factual evidence to show a relationship between a projectile breaking his front window on March 8, 1978 and factors of his federal employment. Appellant contended that the employing establishment failed to submit the results of the police department's tests showing that a bullet had hit his window. He noted the proximity in time between Mr. Mole's arrest and the alleged shooting at his home on March 8, 1978 and the relationship between Mr. Mole and Mr. Naum. Appellant asserted that this established the requisite causal relationship between his employment and the March 8, 1978 incident. The employing establishment generally disagreed that appellant had submitted sufficient evidence to show a relationship between the projectile breaking his front window. It, however, did not specifically address his contention that it failed to submit some of the evidence within its possession and did not provide a detailed analysis of the evidence or argument that it relied on in support of its opinion. Consequently, appellant's allegation is accepted as factual.<sup>17</sup>

The Board also found that additional information was required to determine if the employing establishment committed error or abuse in its investigation of appellant from March 8 to June 28, 1978. Investigations are considered to be an administrative function of the employer when they are not related to an employee's day-to-day duties or specially assigned duties or to a requirement of the employee's employment.<sup>18</sup> The employing establishment retains the right to investigate an employee if wrongdoing is suspected or as part of the evaluation process.<sup>19</sup> Appellant contended that the DOJ did not submit its OPR report. The employing establishment did not specifically state that it had submitted all records associated with the OPR report but instead indicated that it had submitted "all known records." As it is unclear whether the employing establishment provided all records within its possession, appellant's contention that it erred in its investigation into charges of wrongdoing is accepted as a compensable employment factor.

Appellant contends that the employing establishment erred in issuing disciplinary action, failing to provide the fitness-for-duty physician with complete information and evaluating his performance in 1978. Disciplinary actions, performance appraisals and referrals for fitness-for-duty examinations 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, are

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<sup>15</sup> *Id.*

<sup>16</sup> 20 C.F.R. § 10.117(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4(d)(1) (October 1995).

<sup>17</sup> *Id.*

<sup>18</sup> *Jeral R. Gray*, 57 ECAB 611 (2006); *Thomas O. Potts*, 53 ECAB 353 (2002).

<sup>19</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

not compensable.<sup>20</sup> In a May 4, 1978 letter, Mr. Gross noted that the basis for several of the administrative actions taken against appellant appeared “trivial,” including his failure to take annual leave when an individual shot at his house, losing a briefcase and not properly checking out a walkie talkie. In a November 30, 2006 letter, the employing establishment noted that there was no evidence of wrongdoing in an administrative action because there was no finding of error or abuse by an administrative body. It is not necessary, however, to have a finding by an independent body to show error or abuse under the Act. The employing establishment did not specifically support or explain why the administrative actions against him were justified in view of Mr. Gross’s May 4, 1978 letter finding that the actions taken were for insignificant matters. Thus, the Board may accept appellant’s allegations of error or abuse by the employing establishment in issuing disciplinary action, failing to provide the fitness-for-duty physician with complete information and evaluating his performance in 1978 as compensable employment factors.

Appellant alleged that in December 1978 Mr. Naum threatened to break his kneecaps if he got him in trouble by interviewing an individual. The Board has recognized the compensability of physical threats and verbal abuse in certain circumstances.<sup>21</sup> Mr. Colwell, as part of his June 19, 1978 investigative report, related that during the investigation Mr. Naum swore under oath that he did not threaten to break appellant’s kneecaps. Subsequently, however, he “admitted making such a comment but said he meant it only as a cliché.” Appellant has established as factual that Mr. Naum threatened to break his kneecaps. The Board finds that Mr. Naum’s statement, which was made to appellant during the course of a criminal investigation, is sufficiently credible to constitute a compensable employment factor.

Regarding appellant’s transfer to Chicago, the Board has held that an employee’s dissatisfaction with being transferred constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and, absent evidence of error or abuse, is not compensable.<sup>22</sup> The employing establishment considered appellant’s request to stay in his current work location due to family circumstances but denied the request as he was no longer effective in his current location. As appellant has not submitted sufficient evidence to show that the employing establishment erred in transferring him to Chicago, he has not established a compensable work factor.

As appellant has established several compensable employment factors, the case presents a medical question regarding whether his emotional condition resulted from the compensable employment factor.<sup>23</sup> As the Office found 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

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<sup>20</sup> *Jeral R. Gray*, *supra* note 18; *Beverly A. Spencer*, 55 ECAB 501 (2004); *Lillian M. Hood*, 48 ECAB 157 (1996).

<sup>21</sup> *David S. Lee*, 56 ECAB 602 (2005); *Dennis J. Balogh*, *supra* note 12.

<sup>22</sup> *Robert Breeden*, 57 ECAB 622 (2006).

<sup>23</sup> Appellant submitted medical evidence from Dr. Joshua Lowinsky, a Board-certified psychiatrist, in support of his claim.

purpose.<sup>24</sup> After such further development as deemed necessary, the Office should issue a *de novo* decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.<sup>25</sup> The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.<sup>26</sup> In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.<sup>27</sup> Section 10.619(a)(1) of the implementing regulations provides that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.<sup>28</sup> The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.<sup>29</sup> Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.<sup>30</sup>

### **ANALYSIS -- ISSUE 2**

On January 24, 2007 appellant requested that the Office hearing representative issue a subpoena to the employing establishment for his personnel records and the personnel file of Mr. Rissen, a deceased coworker. The hearing representative denied his request on April 17,

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<sup>24</sup> See *Robert Bartlett*, 51 ECAB 664 (2000).

<sup>25</sup> 5 U.S.C. § 8126(1).

<sup>26</sup> 20 C.F.R. § 10.619; *Gregorio E. Conde*, *supra* note 4.

<sup>27</sup> *Id.*

<sup>28</sup> 20 C.F.R. § 10.619(a)(1).

<sup>29</sup> See *Gregorio E. Conde*, *supra* note 4.

<sup>30</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

2007 after finding that he could request the pertinent documents from the employing establishment.

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>31</sup> As appellant has not shown that the personnel records in question cannot be obtained by other means, the Board finds no abuse of discretion in the hearing representative's denial of his request for subpoenas.<sup>32</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant sustained an emotional condition in the performance of duty. As the evidence establishes compensable factors of employment, the Office must analyze and develop the medical evidence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 12, 2007 is affirmed in part regarding the denial of subpoenas and set aside in part and the decision dated December 28, 2006 is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 24, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>31</sup> *Joseph P. Hofmann*, 57 ECAB 456 (2006).

<sup>32</sup> *See Tina D. Francis*, 56 ECAB 180 (2004).