United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 08-1037**
	)	**Issued: September 18, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilkes-Barre, PA, Employer	)	

Appearances:
Raymond A. Mazzarella, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2008 appellant, through his representative, filed a timely appeal from a January 2, 2008 merit decision 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 October 25, 2006 appellant, then a 61-year-old physician, filed a traumatic injury claim alleging that on October 3, 2006 he sustained an aggravation of colitis when he received a letter from the employing establishment placing him on leave without pay. He stopped work on

February 21, 2006 and did not return. The employing establishment noted that appellant was at home using family and medical leave on October 3, 2006.

In an accompanying statement, appellant related that on October 3, 2006 he received letters by certified and regular correspondence placing him on leave without pay. He had not requested leave without pay as he had accrued leave. Appellant stated:

> "I was devastated over how my family would be supported and paranoid about why such a letter would be sent. Until that point I was having subtle improvement in my conditions: my diabetes was in control without the use of insulin, my colitis was stable, and there was slight improvement in my psychiatric condition.
>
> "The letter gave a date by which I was to return to work or face a directed discharge from federal service. The date chosen was in direct conflict with a certified letter dated August 29, 2006 sent to my supervisor the Director and my timekeeper reflecting a request from my psychiatrist that I not return to work until possibly February 2007. Simultaneously, with that correspondence, I requested [the] use of a corresponding combination of my accrued sick and annual leave."

Appellant attempted to contact the Director of the employing establishment eight times on October 3, 2006. The Director responded on October 4, 2006 that he would look into the matter. Appellant tried to contact him but had no further communication until October 16, 2006. He asserted that the employing establishment had not sent similar letters to employees with over a year of accrued leave.

The record reflects that, on August 29, 2006, appellant requested accrued annual leave from November 28, 2006 to January 4, 2007 and accrued sick leave from September 28, 2006 to November 27, 2006. He indicated that he was requesting leave under the Family Medical Leave Act (FMLA). By letter dated September 27, 2006, Joseph McDaniels, an acting chief of the employing establishment, informed appellant that the employing establishment had approved his entitlement to 12 weeks of leave without pay under the FMLA through the week of December 10, 2006. He was to resume work on December 18, 2006.

On October 23, 2006 the employing establishment rescinded the September 27, 2006 letter "in its entirety." On November 7, 2006 the employing establishment approved appellant's request for sick and annual leave through January 4, 2007.

On October 31, 2006 the employing establishment controverted appellant's claim, noting that the September 27, 2006 letter was a "routine letter sent to any employee who has been absent for an extended period of time." On November 9, 2006 Roland E. Moore, the Director of the employing establishment, indicated that the employing establishment sent appellant a letter approving his leave request and specifying that he would be expected to resume work after the leave request in accordance with standard operating procedure. He was out of town from October 3 to 10, 2006 but spoke with appellant about his concerns on the telephone "a few times over the next few days per his request…." Mr. Moore noted that appellant was an experienced

Chief of Staff who understood leave issues. He described appellant's health problems over the last few years.

On December 5, 2006 the Office informed appellant's senator that he had filed a claim, assigned file number 032035986, for employment-related anxiety and depression. It denied the claim in decisions dated April 21, 2005 and May 4, 2006. Appellant subsequently filed the current claim for an aggravation of gastric problems, assigned file number 032053543.

On December 8, 2006 appellant maintained that he had never requested leave without pay. He specified that he claimed that he sustained a reactivation of inflammatory bowel disease and not an emotional condition as a result of receiving the September 27, 2006 letter. Appellant indicated that he had never seen a similar letter during his time at the employing establishment and believed it to be administrative error. He did not receive proper leave approval under the last day of an Equal Employment Opportunity (EEO) appeal.

By decision dated February 1, 2007, the Office denied appellant's claim on the grounds that he failed to establish an injury in the performance of duty. It found that he had not established any compensable employment factors.

On February 8, 2007 appellant requested an oral hearing. He contended that the September 27, 2006 letter was not routine and that the employing establishment had not obtained concurrence from the central office as required. Appellant maintained that the Director harassed him by taking away his electronic mail and computer access when he went on sick leave. He also requested that subpoenas be issued for three individuals with the employing establishment to testify regarding the letter dated September 27, 2007.

On October 3, 2007 the hearing representative denied appellant's request for subpoenas. She found that there were no compelling reasons for issuing subpoenas and that the individuals could submit written statements to the record.[1]

In a statement dated October 9, 2007, Theodore D. Gabriel, Sr., a retired Chief of Human Resources with the employing establishment, noted that if appellant did not request leave without pay he did not understand why management would place him on leave without pay "without justification."

At the hearing, held on October 12, 2007, appellant related that due to his position it was unusual that the September 27, 2006 letter was signed by an acting chief and not an individual at a higher level. He asserted that it was procedurally incorrect to place an individual on leave without pay absent consultation. Appellant believed that it "was an attempt to upset and belittle me." He attempted to contact Mr. Moore about the letter but he was not available for 13 days. Appellant noted that the letter was withdrawn in its entirety after he filed an EEO complaint. He viewed the letter as implying that he was about to be fired and an attack on his ability to support himself and his family.

[1] Appellant has not appealed the denial of his subpoena request.

On November 1, 2007 the employing establishment denied that the September 27, 2006 letter was intended to harass appellant. The employing establishment refuted that appellant was ever placed on leave without pay and noted that such matters did not have to be reviewed by the central office.

By decision dated January 2, 2008, the hearing representative affirmed the February 1, 2007 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 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.[4] 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.[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]

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

[2] 5 U.S.C. §§ 8101-8193; *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).

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

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 filed a claim for a traumatic injury. As he attributed his stress-related aggravation of colitis to events occurring over more than one workday, however, his claim is properly adjudicated as an occupational disease.[13]

Appellant related that the Director of the employing establishment at his work location harassed him by taking away his electronic mail and computer access when he was out on sick leave. He further related that the employing establishment issued the September 27, 2006 letter informing him that he would be placed on leave without pay with the intent to harass him and threaten his livelihood. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[14] A claimant, however, must substantiate allegations of harassment

[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.*

[13] A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

[14] *Doretha M. Belnavis*, 57 ECAB 311 (2006).

and discrimination with probative and reliable evidence.[15] The employing establishment denied harassing appellant. Appellant did not submit any factual evidence in support of his allegations that the employing establishment harassed him by removing his computer access or issuing the September 27, 2006 letter; thus, he has not established a compensable work factor.

Appellant further maintained that the employing establishment committed administrative error in placing him on leave without pay when he had requested a combination of accrued annual and sick leave under the FMLA. Actions of the employing establishment in matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee.[16] Approving or denying a leave request is an administrative function of a supervisor and, absent error or abuse, is not compensable.[17] Appellant submitted a statement dated October 9, 2007 from Mr. Gabriel, a former chief of human resources with the employing establishment, who asserted that he was unable to understand why management approved leave without pay when appellant did not request leave without pay. On October 2, 2006 the employing establishment rescinded the September 27, 2006 letter placing him on leave without pay. The employing establishment asserted that the September 27, 2006 letter was routinely issued but did not discuss why it issued the letter to appellant given his request for accrued annual leave and sick leave. It is not clear from the record whether it is error to place an employee who has accrued annual and sick leave on leave without pay under the FMLA. The Office did not request this information from the employing establishment and did not make a specific finding in this regard. Accordingly, the case is remanded to the Office for further factual development to determine whether the employing establishment erred in this administrative matter.

CONCLUSION

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

[15] *Robert Breeden*, 57 ECAB 622 (2006).

[16] *Judy L. Kahn*, 53 ECAB 321 (2002).

[17] *Beverly R. Jones*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 2, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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