

FACTUAL HISTORY

On June 22, 2000 the Office accepted that appellant, then a 38-year-old firefighter, sustained an employment-related aggravation of bipolar type 1 disorder with psychotic features.¹ It accepted that appellant had established several compensable employment factors, including his feelings of being trapped or imprisoned by his work schedule, which required him to spend 24-hour shifts at work (with occasional overtime work), the anxiety he experienced while waiting for the alarm bell to ring and the anxiety he felt due to not knowing the specific nature of the emergencies to which he would be dispatched.² The Office found that the opinion of Dr. Marc Whaley, a Board-certified psychiatrist, who served as an Office referral physician, showed that these employment factors contributed to appellant's bipolar condition.³

The Office paid appellant compensation for periods of total disability. In a September 9, 2001 report, Dr. Bermon stated that over the last two years (and particularly the last three months) appellant's mood, affect and cognitive processes had improved significantly. Appellant demonstrated no evidence of any thought disorder, his mood was euthymic and his affect was full range. Dr. Bermon indicated that repeat neuropsychological testing showed marked improvement in areas related to functioning at work, including attention, mental control, concentration, nonverbal reasoning and spatial construction. He concluded that appellant could return to his full duties.

On September 28, 2001 appellant returned to work for the employing establishment as a firefighter. After a brief refresher course, he performed all the duties of the position that he previously performed. Appellant stopped work on October 26, 2005 and filed a claim alleging that he sustained a recurrence of total disability due to his accepted emotional condition, aggravation of bipolar type 1 disorder with psychotic features. On the portion of the claim form asking how the recurrence occurred and how it was related to the original injury, appellant stated, "There are rumors at work warning me to watch my back, feeling workers are conspiring against me. I did not know who was telling the truth which made me paranoid and unable to trust anyone at work and unsafe."

In an October 26, 2005 report, Dr. Bermon stated that appellant had a recent exacerbation of his psychiatric symptoms and condition resulting in him being unable to perform his work duties. He recommended that appellant take a medical leave of absence for three weeks after which he should be reevaluated for his ability to return to work.⁴

¹ Appellant had not worked for the employing establishment since May 27, 1999.

² The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable. After establishing an employment factor, a claimant must submit rationalized medical evidence showing that an employment factor caused or aggravated a specific medical condition. See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

³ The Office referred appellant to Dr. Whaley after findings that the opinion of Dr. Maurice Bermon, an attending Board-certified psychiatrist, while not fully rationalized on the issue of causal relationship, was sufficient to require remanding of the case to the Office for further development of the medical evidence.

⁴ Dr. Bermon later indicated that appellant remained incapacitated from work beyond the first three-week period.

On December 23, 2005 Dr. Bermon stated that appellant suffered from bipolar type 1 disorder and generalized anxiety disorder and had suffered a “recurrence and exacerbation of his symptoms of both of these conditions.” Appellant was depressed with symptoms of some paranoia and significant anxiety and felt that there were people at work, including temporary supervisors, who were “out to get him” and maybe even harm him. Dr. Bermon stated that appellant reported that “certain reports and statements have been made about him by these people to the chief, but nobody will tell him exactly what these are or give him any information.” Appellant was concerned that the people in his station were not supportive of him and did not get him up for an alarm call. Dr. Bermon stated that appellant’s current symptoms were characterized by dysphoric mood, constant preoccupation and rumination with markedly decreased attention and concentration. He posited that appellant was completely incapacitated from all work.

On January 12, 2006 Dr. Bermon indicated that appellant presented for follow-up treatment for his bipolar disorder of a depressed/mixed type. Appellant reported that he believed that the fire chief, Timothy S. Kerrigan, was out to fire him and stated that he overheard someone on a telephone and felt that this person was talking about him and spying on him. He also experienced anxiety while completing an extensive form for medical leave. During the examination, appellant felt that a person in the waiting room who was wearing a military uniform was spying on him. Dr. Bermon discussed the findings of his examination and detailed his treatment of appellant with medications.

On February 6, 2006 Dr. Bermon stated that appellant suffered from a bipolar type 1 disorder with episodes that had been both manic depressed and of mixed type. Appellant’s condition essentially started in 1998 and, after a period of recovery, he suffered a significant depression in August 1998. His condition stabilized and he was able to return to work in September 2001. Dr. Bermon stated:

“[Appellant] has had some mild episodes since that time but has continued to work at least until October 2005. At that time, he suffered a significant relapse characterized by mixed emotional states of being quite agitated, hyper-depressed, but again also quite paranoid. [Appellant] again was incapacitated and continues not to be able to return to his duties.”⁵

On April 17, 2006 Dr. Bermon noted an improvement in appellant’s condition and recommended that he return to light-duty work for about two weeks. He indicated that if all went well during this period appellant could return to his full duties. On May 4, 2006 Dr. Bermon stated that over the prior two and a half weeks appellant had experienced a relapse in his condition. Appellant presented with increased anxiety, sleep disturbance, depression, preoccupation and suspiciousness. He received a letter of termination from Mr. Kerrigan for inability to perform his duties which he felt highlighted the lack of support for him at work. Dr. Bermon posited that appellant was permanently disabled from his firefighter job and recommended that he file for disability retirement.

⁵ Dr. Bermon indicated that appellant continued to believe that people at work were “out to get him.”

On June 29, 2007 the Office requested additional factual and medical evidence in support of appellant's claim.⁶ In a July 25, 2006 letter, appellant stated that his condition mostly worsened after he missed a fire call at work. He stated that he was left behind after his coworkers failed to awaken him and he felt that the coworkers or Mr. Kerrigan should have called rescue services. Appellant indicated that the Mr. Kerrigan was upset with him about this incident and stated that some coworkers refused to provide witness statements regarding it and others told him to watch his back. He noted that he felt that "conflicting storys [sic] made me paranoid, untrusting and unsafe at work" and mentioned that he was fighting his removal from work status.

In an August 31, 2006 letter, Mr. Kerrigan denied appellant's claims that he was harassed at work or otherwise subjected to improper actions. Regarding appellant's claim that his condition worsened after missing a fire call, he stated that appellant was awakened on October 14, 2005 by a crew member after being found asleep. Appellant was informed of the circumstances of the fire call and he acknowledged affirmatively that he would be coming. When coworkers made a second attempt to rouse appellant he again acknowledged affirmatively that he would be coming. After waiting several minutes, the fire team made the decision to proceed with the response without appellant in order to avoid endangering the community through further delay. Mr. Kerrigan indicated that the proposed termination action was justified due to appellant's inability to perform his job.⁷

In a January 3, 2008 decision, the Office denied appellant's claim that he sustained a recurrence of disability on or after October 26, 2005 due to his accepted emotional condition, aggravation of bipolar type 1 disorder with psychotic features. It found that the medical reports of Dr. Bermon were not sufficient to establish appellant's claim. Appellant requested a hearing before an Office hearing representative. At the hearing held on June 10, 2008, he argued that his work stoppage beginning October 26, 2005 was due to a recurrence of his accepted emotional condition rather than a new employment-related emotional condition.

In a July 3, 2008 report, Dr. Bermon stated that appellant had been under his care since January 1998 and his diagnosis was bipolar type 1 disorder and generalized anxiety disorder. Appellant returned to work in 2001 and had a period of about four years of stability with good work performance. Dr. Bermon stated that in October 2005, appellant had a recurrence and exacerbation of both his bipolar and anxiety disorders. The symptoms associated with his relapse were markedly increased anxiety, paranoid ideation, agitation and feelings of depression and dysphoria associated with marked anhedonia. Dr. Bermon stated that appellant felt that people at work were "out to get him" and even harm him. Appellant was told that negative statements were made about him and was upset about an incident when he was not roused for a

⁶ In a June 6, 2005 letter, the employing establishment denied that anyone at work was out to get him or that he was otherwise harassed.

⁷ Appellant was terminated from the employing establishment in October 2006.

fire call. Dr. Bermon indicated that appellant's condition in 2005 was a recurrence of the earlier condition accepted by the Office because he had similar symptoms during both periods. He stated:

“There is no question in my mind that what [appellant] experienced in October 2005 and there afterwards [sic] once again there was recurrence and exacerbation of his documented [b]i[p]olar [d]isorder and [g]eneralized [a]nxiety Disorder. The symptoms described above are quite consistent with what he experienced in 1998. [Appellant's] initial symptoms in the recurrence consisted of agitation, ruminative thinking, decreased sleep, paranoia and this was followed by a significant depressive episode of anhedonia, hypersomnia, not taking care of himself and lack of motivation and interest as well as a persistent sense of flatness. I also feel that his recurrence was precipitated by the situation at work and his feeling of lack of support and that the [c]aptain was trying to get rid of him. [Appellant] was often receiving disciplinary action and was accused of being [absent without leave] because of lack of medical documentation which in fact was not the case since I regularly informed either the [c]aptain or the [c]hief that he was under my care and be continued to be incapacitated.”⁸

In a July 28, 2008 decision, the Office hearing representative affirmed the Office's January 3, 2008 decision. He denied appellant's claim that he sustained a recurrence of disability on or after October 26, 2005 due to his accepted emotional condition, aggravation of bipolar type 1 disorder with psychotic features. The Office hearing representative also determined that appellant had not established that he sustained a new employment-related emotional condition because he had not established any compensable employment factors. He indicated that appellant had not shown that he was subjected to harassment or improper administrative actions by supervisors or coworkers.

LEGAL PRECEDENT -- ISSUE 1

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which compensation is claimed is causally related to the accepted injury.⁹ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.¹⁰ Where no such rationale is present, medical evidence is of diminished probative value.¹¹

⁸ The record contains a May 24, 2007 decision of the U.S. Merit Systems Protection Board, which dismisses an appeal appellant filed in connection with the employing establishment's termination actions.

⁹ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

¹⁰ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

¹¹ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

ANALYSIS -- ISSUE 1

On June 22, 2000 the Office accepted that appellant, then a 38-year-old firefighter, sustained an employment-related aggravation of bipolar type 1 disorder with psychotic features. In late 2001, appellant returned to his regular work for the employing establishment as a firefighter. He stopped work on October 26, 2005 and filed a claim alleging that he sustained a recurrence of total disability due to his accepted emotional condition.

The Board finds that the Office properly determined that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after October 26, 2005 due to his accepted emotional condition, aggravation of bipolar type 1 disorder with psychotic features.

In several reports, Dr. Bermon, an attending Board-certified orthopedic surgeon, argued that appellant's condition and disability beginning in October 2005 constituted a recurrence of his accepted employment injury. For example, in a December 23, 2005 report, he stated that appellant suffered from bipolar type 1 disorder and generalized anxiety disorder and had suffered a "recurrence and exacerbation of his symptoms of both of these conditions." In a February 6, 2006 report, Dr. Bermon discussed appellant's return to work in 2001 after the Office accepted his emotional condition and stated, "[Appellant] has had some mild episodes since that time but has continued to work at least until October 2005. At that time, he suffered a significant relapse characterized by mixed emotional states of being quite agitated, hyper-depressed, but again also quite paranoid." In a July 3, 2008 report, Dr. Bermon stated that there was no question that what appellant experienced in October 2005 and thereafter was a recurrence and exacerbation of his documented bipolar disorder and generalized anxiety disorder. He indicated that appellant's condition in 2005 was a recurrence of the earlier condition accepted by the Office because he had similar symptoms during both periods. These symptoms included agitation, ruminative thinking, decreased sleep, paranoia, anhedonia, hypersomnia, lack of motivation and a persistent sense of flatness.

The Board notes that these reports are of limited probative value on the relevant issue of the present case in that they do not contain adequate medical rationale in support of their opinions that appellant sustained a recurrence of disability due to his accepted emotional condition.¹² Dr. Bermon did not describe appellant's accepted emotional condition in any detail or explain the medical process through which it could have spontaneously recurred in October 2005. He argued that appellant's condition in 2005 was a recurrence of the earlier condition accepted by the Office because he had similar symptoms during both periods. However, the Board has held that the fact that a condition manifests itself or worsens during a period of employment¹³ or that work activities produce symptoms revelatory of an underlying

¹² See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

¹³ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

condition¹⁴ does not raise an inference of causal relationship between a claimed condition and employment factors.

The Board further notes that the probative value of Dr. Bermon's reports in establishing a recurrence of disability due to the accepted emotional condition is severely compromised by the fact that Dr. Bermon greatly emphasized new factors in shaping appellant's emotional condition beginning in October 2005. For example, he noted that appellant had increased symptoms after he reported that he felt that coworkers and supervisors were "out to get" him or harm him. Dr. Bermon also emphasized an incident reported by appellant regarding a time that coworkers failed to rouse him for a fire call. He had indicated in April 2006 that appellant could return to light-duty work for about two weeks, but he reversed his opinion after appellant reported a strong reaction to a letter of termination he received at work. Dr. Bermon stated in his July 3, 2008 report, "I also feel that his recurrence was precipitated by the situation at work and his feeling of lack of support and that the [c]aptain was trying to get rid of him." In addition, he implicated generalized anxiety disorder in appellant's condition beginning in October 2005 but this was not a condition that had been accepted by the Office.

Therefore, Dr. Bermon's reports contain equivocal opinions on the cause of appellant's disability beginning October 2005. On the one hand, they contain unrationalized opinions indicating that appellant sustained a recurrence of disability due to his accepted emotional condition. On the other hand, Dr. Bermon seemed to suggest that appellant sustained a new employment-related emotional condition. The Board has found that an opinion which is equivocal is of limited probative value regarding the issue of causal relationship.¹⁵

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹⁶ He failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁷ On the other hand, the disability is not covered where it results from such factors as an

¹⁴ *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

¹⁵ *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

¹⁶ *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

¹⁷ 5 U.S.C. §§ 8101-8193.

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.¹⁸

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.¹⁹ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.²⁰

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.²¹ 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.²²

ANALYSIS -- ISSUE 2

The Office also found that appellant had not established that he sustained a new employment-related emotional condition in 2005 because he had not established any compensable employment factors. It indicated that appellant had not shown that he was subjected to harassment or improper administrative actions by supervisors or coworkers. The Board finds that the Office properly determined that appellant did not establish the occurrence of a new employment-related emotional condition. In explaining this finding, the Board must initially review whether these alleged new incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. He claimed that supervisors and coworkers were "out to get" him, that certain people were spying on him, that coworkers were conspiring against him and told him to watch his back and that Mr. Kerrigan, the fire chief, was intent on firing him through any means. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as

¹⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

²⁰ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

²¹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

²² *Id.*

occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.²³ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.²⁴

In the present case, employing establishment officials, including Mr. Kerrigan, denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.²⁵ Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.²⁶ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant also alleged that the employing establishment mishandled an incident when he was not roused for a fire call, that his medical documents were not properly accepted to support leave usage, and that he was unfairly disciplined, including the occasion when he was terminated from the employing establishment. The Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.²⁷ Although the handling of these matters would generally be related to the employment, these matters represent administrative functions of the employer, and not duties of the employee.²⁸ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁹

The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. He did not submit any supporting evidence such as a favorable finding of a grievance regarding these matters.³⁰ Mr. Kerrigan explained that coworkers made repeated attempts to rouse appellant for

²³ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

²⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²⁵ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²⁶ See *William P. George*, 43 ECAB 1159, 1167 (1992).

²⁷ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

²⁸ *Id.*

²⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

³⁰ The record contains a May 24, 2007 decision of the U.S. Merit Systems Protection Board which dismisses an appeal appellant filed in connection with the employing establishment's termination actions.

a fire call and that appellant assured them that he would be coming. He further indicated that the fire truck could not be held any longer because to do so would compromise the safety of the community. Mr. Kerrigan also explained that appellant's termination and other disciplinary actions were justified. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

For the foregoing reasons, the evidence does not show the existence of any new compensable employment factors under the Act and, therefore, appellant has not shown that he sustained a new emotional condition in the performance of duty which caused disability beginning in October 2005.³¹

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after October 26, 2005 due to his accepted emotional condition, aggravation of bipolar type I disorder with psychotic features. The Board further finds that appellant did not meet his burden of proof to establish that he sustained a new employment-related emotional condition.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 28 and January 3, 2008 decisions are affirmed.

Issued: April 16, 2009
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

³¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).