United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 09-752**
	)	**Issued: January 21, 2010**
SOCIAL SECURITY ADMINISTRATION, CENTER FOR HUMAN RESOURCES, Grand Rapids, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 26, 2009 appellant filed a timely appeal of a January 6, 2009 decision of the Office of Workers' Compensation Programs which affirmed a June 24, 2008 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 emotional condition case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 23, 2007 appellant, then a 53-year-old senior attorney adviser, filed an occupational disease claim alleging long term chronic stress since 2005." He noted that there was no other source of stress in his life. Appellant noted having gastrointestinal illness including acid reflux and involuntary muscle contractions of the throat and esophagus. He first became

aware of his condition on March 1, 2006 and realized its relationship to his employment on May 7, 2006. Appellant did not stop work. The employing establishment controverted the claim.

Appellant alleged that in March or April 2006 he developed a sudden onset of throat pain and fatigue. His attending physician, Dr. Christopher Zielinski, a Board-certified family practitioner and osteopath, initially believed that appellant had a virus or infection. He was diagnosed with acid reflux and involuntary muscle contraction within the throat/esophagus. Dr. Zielinski suggested that it might be due to stress. Appellant described work activities which he believed contributed to his condition. He had reported inappropriate and potentially illegal conduct by certain managers but he was treated as a wrongdoer when his allegation were investigated. Appellant alleged that another employee, who was also a whistle-blower, was fired during a meeting with an Equal Employment Opportunity (EEO) Commission representative. He stated that other employees were reluctant to provide information to investigators. Appellant noted that he was not provided with details of the investigation. He noted that several months later the hearing office chief judge stepped down from his position. After the investigation, appellant could not enter his office outside of normal duty hours unless a designated officer in charge was present. He alleged that the individuals performing as officer in charge were hand selected by management. Appellant contended that he was to have unlimited office access under the NTEU National Agreement and he filed a grievance. He alleged that these changes were in retaliation for whistle-blowing. After the investigation appellant was directed to be "tutored" about his job functions by a nonattorney group supervisor. He was given his annual appraisal by a nonattorney hearing officer allegedly in violation of the union contract. Appellant filed grievances related to these matters that were denied at steps one and two. On appeal, the chief judge did not respond to his grievances until seven months later with a denial. He attributed stress as the employing establishment did not timely resolve the issues raised in his grievances. Appellant alleged that management created a hostile work environment as it searched the work space and file cabinets of targeted coworkers when away from their desks, treated coworkers inappropriately and targeted a local administrative law judge who followed the policy and procedures of the national office. He stated that the hostile work environment, affected his ability to maintain persistence and pace in relation to his job duties. Appellant alleged that he had the same symptoms in 2005 when the employing establishment conducted an investigation related to the chief judge.

In letters dated June 25, 2007, the Office requested additional factual and medical evidence from appellant and the employing establishment.

In a July 4, 2007 statement, appellant attributed his emotional condition to his workload and the press for production; inappropriate activities at the employing establishment and retaliation; the failure to timely resolve grievances; witnessing inappropriate activities by Chief Judge William Decker and other management staff, including the acceptance of gifts from prohibited sources. In January 2005, he reported this to the Commissioner of Social Security and the Office of the Inspector General and was informed it would be investigated. Appellant noted that the investigators interviewed most employees and that, afterwards, Sue Gilbert, a supervisor and hearing office director, fired Sai Naik, a probationary employee. He received confidential information from a coworker, who was a friend of Ms. Gilbert's husband, who disclosed this information. Appellant found it stressful that confidential information about employees was

disseminated by Ms. Gilbert and he questioned her trustworthiness. He alleged that once the firing took place, Judge Paul Lillios stood outside his door with a tie folded up in his hand forming a noose. Appellant alleged that Judge Lillios stood for about 30 seconds and glared at him, but said nothing. He alleged that he was identified as one of the persons who provided information. In July 2005, the security policy was changed and his access code was revoked although a union contract gave him the same access as the judges. Appellant characterized this as retaliation for filing a grievance in November 2005. He also filed a grievance related to a performance appraisal by Ms. Gilbert, a nonattorney, contrary to employing establishment guidelines. Appellant was required to have one-on-one training with a nonattorney supervisor to mentor him on decision writing. After he filed his occupational disease claim, Chief Judge William King made condescending and accusatory remarks regarding the quality of an order appellant prepared. Appellant asserted that he simply followed the judge's directive on this. He submitted January 21, 2005 letters related to an ethics complaint and an April 5, 2005 letter to the commissioner of social security related to centralized screening; a May 23, 2005 letter from an associate commissioner noting receipt of appellant's correspondence; grievances dated November 14 and 25, 2005; e-mail correspondence related to work procedures and uniformity; a July 19, 2005 employing establishment memorandum regarding new security and building access procedures; decisions denying his grievances; and a June 6, 2007 memorandum to the Chief Judge regarding an accompanying order and a dismissal. He also included a reply from Chief Judge King, responding to appellant about the quality of an order to gather samples of how the judge wanted orders prepared.

In a July 9, 2007 letter, Chief Judge King informed the Office that appellant was under the general supervision on Ms. Gilbert. He noted that she was not an attorney and did not review and assess the technical legal aspects of appellant's work. Chief Judge King explained that he shared supervisory responsibility for this. He noted that appellant had not alleged that any of his actual work duties caused him stress. Chief Judge King had asked appellant to try to increase the volume of work he completed but there had been no change. He advised that appellant was not required to work overtime, had no quotas, did not travel and had few deadlines. Chief Judge King stated that, while the assignments could be challenging, they were not intense. He was unaware of any conflicts between appellant and his coworkers or supervisors, although appellant had expressed significant animosity towards management at all levels of the agency. Chief Judge King noted no staffing shortages that would affect appellant's workload and no extra demands were placed on him. Appellant's performance was consistently at or below average compared to other employees performing similar work. Chief Judge King noted that appellant was advised to spend more time working and less time "getting involved in matters that are not related to his job such as personnel issues of other employees and management issues." Appellant was advised that these issues were outside the scope of his duties

In an accompanying undated statement, Ms. Gilbert noted that appellant's complaints pertained to other employees and not to his work duties. She confirmed that in June 2005 a probationary employee's employment ended during a visit by central office staff. Ms. Gilbert stated that the hearing office chief judge stepped down from his position in January 2006 because he no longer wished to be chief judge, not because he was forced out. She denied any inappropriate or potentially illegal conduct at the employing establishment or that appellant had been treated as a wrongdoer. Ms. Gilbert denied that management had encouraged employees to not cooperate with investigators. The change in office policy concerning unrestricted office

access by employees was not retaliation. In June 2005, the chief judge directed that access should be limited to management unless there was a compelling need to provide it to designated employees who were responsible for opening or closing offices. Ms. Gilbert denied that training provided by a nonattorney was related to an investigation. She stated that appellant and each other decision drafters were informed that management was seeking to improve performance by having a group supervisor provide two hours of one-on-one training. Appellant was not exempt from the training. Regarding his appraisal, Ms. Gilbert explained that it was standard procedure for nonattorney directors to conduct appraisals with the chief judge as a cosigner and that appellant had received appraisals from nonattorney supervisors since 1998. Ms. Gilbert stated that the time it took to resolve grievances was beyond her control. She denied any situation in which management had improperly searched the work space of employees or had targeted employees. Ms. Gilbert advised that these matters were not related to appellant's attorney adviser duties. She could not comment on the work performance of any judge or specific interactions between managers and a judge other than to note that these conversations were conducted in private. Although appellant had alleged that the stress at work impacted his ability to maintain "persistence and pace" related to his job duties, Ms. Gilbert had not noted a decline in the quantity of work he performed. Ms. Gilbert denied any inappropriate conduct by the chief judge.

The Office received diagnostic tests between June 25, 2005 and February 8, 2007. Appellant submitted a June 7, 2007 disability certificate, from Dr. Zielinski who placed him off work until June 21, 2007 for high blood pressure. In a July 9, 2007 report, Dr. Zielinski opined that appellant had systolic hypertension, generalized anxiety disorder with the complication of globus hystericus, which was secondary to stress in the workplace. The Office also received appellant's position description.

In an August 15, 2007 letter, appellant submitted a July 9, 2007 report from Dr. Bruce Fowler, a licensed clinical psychologist, who diagnosed panic disorder without agoraphobia. Dr. Fowler stated that it was "reasonable to see [appellant's workplace] stress as the central contributor to his symptoms of panic and anxiety."

By decision dated June 24, 2008, the Office denied the claim finding that appellant failed to establish any compensable employment factors.

On June 26, 2008 appellant requested a hearing that was held on September 30, 2008. Appellant's representative contended that his managers showed a pattern of harassment and retaliation due to his whistle-blowing activity. Appellant felt threatened and harassed by the actions of his supervisors. He alleged that the procedures for accepting draft orders had changed, which included no more oral communication with the judges and utilizing a format called fit. When appellant used this format, the chief judge criticized his work and called it a piece of trash. When asked if a judge had held a tie in his hands, appellant responded "anything is possible."

On November 19, 2007 Chief Judge King explained the change in access policy. Prior to June 2005, all employees had unrestricted access to the office during nonworking hours. Thereafter, the regional chief judge directed limited access during nonworking hours. He noted that only management and a small number of nonmanagement personnel were allowed access to alarm codes. Chief Judge King explained that the decision as to who had access was based on

reliable availability. He also noted that approximately half of the judges did not have access to the office during nonwork hours. Chief Judge King also addressed appellant's allegation about a change in policy related to not accepting work directly from a judge. He noted that this was a long-standing office policy of which he regularly needed to remind decision writers. Regarding his criticism of appellant's work, Chief Judge King explained that appellant had used the wrong template and that he explained the problem and provided suggestions for a solution. He also informed appellant when he did good work. Appellant had since been granted a disability retirement and began representing social security claimants.

By decision dated January 6, 2009, the Office hearing representative affirmed the Office's June 24, 2008 decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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.[2]

A claimant 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.[3] This burden includes the submission of a detailed description of the employment factors or conditions, which the employee believes caused or adversely affected the condition or conditions, for which compensation is claimed.[4]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen,* 41 ECAB 387 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991); *Lillian Cutler,* 28 ECAB 126 (1976).

[3] *Pamela R. Rice,* 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris,* 44 ECAB 470, 473-74 (1993).

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

factor. When the matter asserted is a compensable factor of employment and the evidence of the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

ANALYSIS

Appellant alleged that he sustained emotional and gastrointestinal conditions due to several employment incidents. The Board must review whether the alleged incidents are compensable under the terms of the Act.

Appellant made several allegations related to administrative or personnel matters. These allegations are unrelated to his regular or specially assigned work duties and do not generally fall within the coverage of the Act.[7] The Board has held, however, that an administrative or personnel action may be considered an employment factor where the evidence discloses error or abuse. In determining whether the employing establishment erred or acted abusively, the Board has examined whether management acted reasonably.[8]

Appellant asserted that his managers engaged in inappropriate and potentially illegal conduct which included accepting gifts. He reported the conduct and an investigation was conducted but he was never provided with the details. The Board has held that investigations are an administrative function of the employer and do not involve an employee's regularly or specially assigned employment duties. Absent evidence of error or abuse, an investigation is not a compensable work factor.[9] The record reflects that the employing establishment investigated the allegations and reasonably took action that it deemed appropriate. Appellant did not submit evidence to establish error or abuse by his manager as alleged.

Appellant also alleged that the employing establishment's delay in processing his grievances was stressful and hindered his work performance. However, the grievances were denied and did not provide any finding of error or abuse by either party.[10] Ms. Gilbert advised that she had no control over the time it took to bring grievances to resolution. There is no evidence showing that the employing establishment acted unreasonably in its administrative capacity in processing appellant's grievances.

Appellant disagreed with the firing of a probationary employee and alleged that management routinely inspected the offices and desks of employees when they were away. The Board notes that is an administrative matter unrelated to appellant's regularly assigned duties.

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[6] *Id.*

[7] An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *Sandra Davis*, 50 ECAB 450 (1999).

[8] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[9] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[10] *See James E. Norris*, 52 ECAB 93 (2000) (grievances and EEO complaints, by themselves, do not establish harassment or unfair treatment).

Although the handling of disciplinary actions, evaluations and leave, the assignment of work duties are generally related to the employment, they are administrative functions of the employment and not duties of the employee.[11] Appellant has not submitted sufficient evidence to establish error or abuse in this instance. He disagreed with management having a nonattorney conduct his performance evaluation or provide him with training. As noted, such evaluations are an administrative matter unrelated to his regularly assigned duties.[12] Ms. Gilbert responded that the reviews were cosigned by the chief judge and that appellant's evaluations had been performed in this manner since 1998. Appellant has not shown error or abuse in these matters.

Appellant alleged that Chief Judge King was critical of his job performances. He attributed stress to his workload and the press for production. Appellant referred to a June 2006 e-mail from Chief Judge King, which addressed an order that appellant had prepared. Chief Judge King indicated that appellant's work was not in compliance with regard to a particular format and provided samples for appellant to utilize. Supervisory assessments of performance are administrative matters that are not covered under the Act unless there is evidence of error or abuse.[13] Chief Judge King responded that he had offered appellant a sample as to how to complete the order. The record contains numerous e-mails in which he was complimentary to appellant's work. The Board finds no evidence of error or abuse. Chief Judge King noted that appellant was encouraged to increase his work volume but that he was not given any quotas, was not required to work overtime and had few deadlines. To the extent that appellant was alleging that he was overworked or that work requirements caused stress, the Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.[14] However, he did not provide specific information on particular work assignments that caused him stress. Chief Judge King confirmed that appellant generally worked at his own pace and Ms. Gilbert noted that there was no decline in the volume of appellant's work. Appellant has not established a compensable work factor in this regard.

Appellant also alleged that the access codes at work were changed such that he no longer had unlimited access to the building. Chief Judge King explained that in June 2005 new procedures were implemented. The Board finds that this is an administrative matter unrelated to appellant's regularly assigned duties. The employing establishment explained why the new procedures were implemented and explained the reasons for the selection of those who had building access codes. There is no evidence that the employing establishment acted unreasonably in this matter.

Appellant has also alleged harassment and retaliation for whistle-blowing. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors

[11] 5 U.S.C. §§ 8101-8193; *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[12] *Id.*

[13] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[14] *Lillian Cutler*, *supra* note 2.

and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[15] 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.[16] The employing establishment has denied that appellant was harassed or discriminated against and appellant has not submitted sufficient evidence to establish his allegations.[17] Chief Judge King and Ms. Gilbert submitted statements addressing appellant's allegation which denied that he was unfairly treated and which explained the reasons for the employing establishment's actions. 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 specific statements actually were made or that the actions actually occurred at particular times and places.

Appellant alleged that the change in access code policy was a form of harassment or retaliation but has provided no credible evidence to substantiate this assertion. Chief Judge King explained that the policy change was undertaken due to a June 2005 directive from the regional chief judge and that about half of the judges also did not have access codes. Similarly, appellant asserted that having his reviews performed by a nonattorney was a form of retaliation. Ms. Gilbert explained as noted that this was a long-standing practice and that judges continued to have input on such appraisals. Appellant has not shown that he was singled out or treated differently from other attorneys in the office. He has not submitted any evidence to support that these actions would constitute harassment or retaliation.

Appellant also alleged that he was harassed by Judge Lillios, who stood in front of his office while handing a tie hanging like a noose. When asked if he said anything, he indicated that Judge Lillios did not say anything. Appellant also noted at his hearing that it was possible that the tie may have just been hanging from the judge's hand. The Board notes that there is insufficient evidence to confirm that any such incident occurred. As noted, mere perceptions of harassment are not compensable.

Consequently, appellant has not established that any of the actions by the employing establishment to which he attributes his emotional or gastric conditions are compensable factors of employment. Therefore, appellant has not established his claim.[18]

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

[16] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[17] *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).

[18] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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