United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 09-1204**
	)	**Issued: March 1, 2010**
TENNESSEE VALLEY AUTHORITY, CUMBERLAND FOSSIL PLANT, Cumberland, TN, Employer	)	

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 July 14, 2008 appellant filed a timely appeal from September 25, 2007 and April 15, 2008 merit decisions of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On March 7, 2007 appellant, then a 63-year-old yard electrician technician, filed an occupational disease claim alleging that he sustained a stress-related condition due to factors of his federal employment. He attributed his condition to the way he was treated after he returned to work following a traumatic injury to his head. Appellant related that he was separated from

the rest of his coworkers and began to worry that he would be fired. The employing establishment terminated him from employment on May 15, 2006.

On April 18, 2007 the Office requested additional factual and medical information from appellant. In a statement received April 23, 2007, appellant related that his condition began on October 22, 2001 after he returned to work from a September 8, 2001 head injury.[1] He alleged that the employing establishment put him in a tiny room behind a tool room where it kept lubricants and cables. Appellant related that the room was "poorly lighted and heated" and that he wore heavy clothing in the winter. He felt isolated from his coworkers and was given unnecessary work making extension cords. Appellant related that the smell from the lubricants stored in the room gave him severe headaches. When he complained about the room he found out that the drain in the floor lead to the sewage system. Appellant was relocated to a location in the electric shop with much improved conditions. After he received permanent work restrictions in 2002 management began to harass him by trying to make him work outside with heavy equipment even though that was not within his capability. Appellant feared losing his job for five years prior to his termination on May 15, 2006.

On April 16, 2007 the employing establishment controverted the claim. Gary R. MacDonald, a manager, related that appellant returned to light duty after his September 2001 work injury. On August 29, 2005 the Office notified him that it proposed to terminate his compensation on the grounds that he had no residuals of his September 1, 2001 employment injury. Appellant retired from the employing establishment on May 15, 2006.

On May 14, 2007 appellant described his treatment after the September 2001 injury. He stated:

> "Upon returning to work in October 01, I was assigned to an isolated rigging room that was cold and not properly lighted and ventilated. I was not allowed to go back to the electric shop where I was assigned before the accident. I was given a table and chair and asked to make a few extension cords. Mostly, I was given solitary confinement and often became sick at my stomach from the smells. I was not able to take much of this so I took a lot of annual leave in November and December. This lasted until March when there was a meeting with upper management and it was decided to put me in the electric shop."

Appellant related that the employing establishment did not provide him with meaningful work and refused to train him for another position. In May 2002 a supervisor tried to assign him work outside his restrictions. The employing establishment sent appellant for a psychiatric evaluation in June 2004 and refused to allow him to be part of a voluntary reduction-in-force (RIF). When his physician took him off work, the union told him that the employing

[1] In a report dated June 9, 2004, Dr. Ronald Salomon, a Board-certified psychiatrist, diagnosed a severe mood disorder secondary to a closed head injury and likely post-traumatic stress disorder (PTSD) due to his accident and abusive treatment at work. He noted that appellant had no prior history of injury before a "10,000 pound transformer fell on his head at work ... crushing his hard hat and head between the transformer and an immobile structure…." Dr. Salomon related that he believed that management was attempting to force him to quit and placed him in "a torture chamber with a table and light in a small room with oil and other odors emanating from a backed up sewer with drain in the room."

establishment planned to terminate him. Appellant worried about losing his job. In 2005 the employing establishment harassed him by sending him to nine doctors for fitness-for-duty evaluations. The employing establishment terminated him in April 2006.

In a statement dated May 21, 2007, Mr. MacDonald indicated that appellant initially worked in a room behind the tool room until he was moved after he complained of odors. Appellant worked in the electric shop until provided an office to himself because of his injury. He did not work outside his restrictions and performed "meaningful work." Appellant performed his duties as a modified electrician satisfactorily.

On April 14, 2006 the employing establishment notified appellant that it was terminating him from employment effective May 15, 2006 because he was unable to perform the duties of his position. It indicated that he had worked light duty since his injury on September 8, 2001 but that the Office had determined that he had no residuals of his work injury.

In a statement dated July 12, 2007, appellant's wife related that on September 8, 2001 he sustained a head injury at work that required him to be "life-flighted to Vanderbilt." He tried to continue working but a neurologist took him immediately off work. Appellant's wife noted that the Office issued a notice of proposed termination under his head injury claim but that the termination was reversed. The employing establishment put him in an unheated storage room from October 2001 until early March 2002 and refused his request for training so that he could do meaningful work.

By decision dated September 25, 2007, the Office denied appellant's emotional condition claim after finding that he did not establish any compensable employment factors. On October 8, 2007 appellant requested an oral hearing.

At the hearing, held on March 4, 2008, appellant related that the employing establishment refused his request for training after his September 2001 work injury. When he returned to work, he was placed in a poorly lit room with a small heater on the ceiling. It smelled of lubricants and sewer gas coming from a drain to the septic system. Supervisors would tell him that he had a job assignment that he had to do or he would be fired. The job assignment would be to go for an evaluation. The employing establishment tried to get his restrictions changed. He tried to apply for managerial work but was told he was not qualified. In November 2002 appellant was placed in an equipment room without any work. He experienced pain down his neck and left arm and went to the emergency room because he believed that he had a stroke. The employing establishment tried to prevent appellant's return to work but his physician released him for duty. Appellant began working in the electric shop and in 2003 again had problems with diesel fumes and headaches. Coworkers sometimes threw gas bombs into his area so that he would have headaches. The employing establishment denied his request to participate in a voluntary RIF.

By decision dated April 15, 2008, an Office hearing representative affirmed the September 25, 2007 decision.

On appeal, appellant described the room he worked in when he returned to work following his September 8, 2001 head injury. He reiterated that he performed duties that were not meaningful.

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 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

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[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).

[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).

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

Appellant asserted before the Office and on appeal that he was not given meaningful work after his September 2001 head injury. He related that the employing establishment denied his request for training, refused to let him participate in a voluntary RIF and told him that he was not qualified for a managerial position. The assignment of work duties, the granting or denying of requests for training and the denial of promotions are administrative functions of the employer and not duties of the employee.[13] An administrative or personnel matter will be considered compensable employment factors only where the evidence discloses error or abuse by the employing establishment.[14] An employee's dislike of his job duties or the desire for a different position is not a compensable factor of employment.[15] In a statement dated May 21, 2007, Mr. MacDonald, a manager at the employing establishment, maintained that appellant was provided meaningful work within his restrictions. Appellant has not submitted sufficient evidence to support his allegation that the employing establishment committed error or abuse in the assignment of work, the denial of his request for training, the denial of a promotion or the refusal to let him participate in a voluntary RIF, and thus he has not established a compensable work factor.

[10] *Beverly R. Jones*, 55 ECAB 411 (2004).

[11] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[12] *Id.*

[13] *C.S.*, 58 ECAB 137 (2006); *Hasty P. Foreman*, 54 ECAB 427 (2003).

[14] *C.S.*, *supra* note 13; *T.G.*, 58 ECAB 189 (2006).

[15] *Katherine A. Berg*, 54 ECAB 262 (2002).

Appellant further related that the employing establishment harassed him by sending him for numerous fitness-for-duty examinations. If disputes and incidents alleged as constitutes harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of his regular duties, these could constitute employment factors.[16] The evidence, however, must establish that the incidents of harassment and discrimination occurred as alleged.[17] Further, fitness-for-duty examinations are administrative and personnel requirements and not compensable absent a showing or error or abuse on the part of the employing establishment.[18] Appellant has submitted no evidence corroborating his allegation that the employing establishment harassed him or committed abuse in sending him for fitness-for-duty examinations. Thus, he has not established a compensable employment factor.

Appellant also related that in May 2002 a supervisor attempted to assign him work outside his restrictions. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity is substantiated by the record. Mr. MacDonald, however, denied that he was assigned work outside his restrictions. Appellant has not established a factual basis for his allegation and further, he refused to perform the duties. The possibility of a future injury does not form the basis for payment of compensation under the Act.[19]

Appellant maintained that he was afraid that he would lose his job for five years. He asserted that the employing establishment terminated him on May 15, 2006. A claimant's job insecurity is not a compensable factor of employment under the Act.[20] While the record contains an April 14, 2006 letter from the employing establishment notifying him of a proposed removal because he was unable to perform the duties of his position, Mr. MacDonald related that appellant retired from work.

Appellant attributed his condition, in part, to management placing him in a small room that was poorly lit and smelled of fumes and sewage from October 1, 2001 until March 2002. He asserted that he had headaches and nausea because of the smell and felt isolated from his coworkers. On appeal, appellant contends that he became distressed and sustained an emotional condition due in part to working in a dimly room that smelled of lubricants and sewage. Mr. MacDonald did not dispute that he was exposed to fumes or that the room was poorly lit and isolated but instead related that management moved him to another location after he complained of fumes. The Board has held that when appellant encounters conditions such as odors in the

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

[17] *Id*.

[18] *Lille M. Hood*, 48 ECAB 157 (1996); *Alice M. Washington*, 46 ECAB 382 (1994).

[19] *Andy J. Paloukos*, 54 ECAB 712 (2003).

[20] *Paul L. Stewart*, 54 ECAB 824 (2003).

performance of his regular or specially assigned duties, they may constitute compensable employment factors under the Act.[21]

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 15, 2008 and September 25, 2007 are set aside and the case is remanded for further action consistent with this opinion of the Board.

Issued: March 1, 2010
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

[21] *See Brenda L. Dubuque*, 55 ECAB 212 (2004); *Kathleen D. Walker*, 42 ECAB 603 (1991).