

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

F.A., Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Atlanta, GA, Employer**

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**Docket No. 10-389
Issued: October 21, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 27, 2009 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated July 14, 2009. 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 met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 9, 2008 appellant, then a 48-year-old information specialist, filed a claim alleging that he sustained an emotional condition in the performance of duty. He asserted that while attending a conference in Denver on July 9, 2008 Thomas Scott Wilkie, his supervisor, told the attendees not to go to the restroom during the conference unless one's "bladder was about to burst." Appellant asserted that Mr. Wilkie also stated that another supervisor indicated that the attendees were not to leave their seats for any reason. On the claim form, Mr. Wilkie,

stated that appellant left the conference room on July 9, 2008 to get refreshments while a speaker was presenting. He spoke to all three members of his staff attending the conference (appellant, Prince Hall and Edmund Harvey) told them that they should not leave the conference for refreshments or to answer their cell phones. Mr. Wilkie stated that he specifically told them that this directive did not apply to using the restroom.

Appellant submitted several statements in which he further discussed the incidents and conditions at work which he believed caused his emotional condition. He provided further details about his claim that on July 9, 2008 Mr. Wilkie told him that he could only leave the conference if his bladder was about to burst. Appellant discussed his attempts, between mid and late August 2008, to meet with Reginald Bigham, a Deputy Director for the employing establishment, to discuss complaints he had about Mr. Wilkie and some coworkers, including Mr. Harvey and Quintin Richardson. He suggested that several officials wrongly prevented him from meeting with Mr. Bigham.¹ Appellant also alleged that he was wrongly criticized for calling Mr. Richardson's supervisor at Harris Corporation. He claimed that on August 13, 2008 he was deliberately ignored by Mr. Richardson. When appellant called him on the telephone, he refused to answer. Mr. Richardson told appellant that he was not on the telephone when he called and Mr. Hall then stated, "He [ha]s been ignoring you." Appellant indicated that Mr. Richardson displayed a smirking smile on his face as if to say he did not care whether he answered his telephone or not.

Appellant further claimed that Mr. Harvey harassed him on August 15, 2008 by asking him four times whether he got an email regarding a work team meeting that had recently been held. He felt that Mr. Harvey was trying to make him angry and responded each time, "What can I do for you?" Appellant acknowledged that he became frustrated and raised his voice towards the end of his conversation with Mr. Harvey. He asserted that Mr. Wilkie did not adequately support him when he spoke to him about the matter because he indicated that Mr. Harvey was "only joking." Appellant alleged that the employing establishment wrongly terminated him in late August 2008 and suggested that the termination was precipitated by his whistleblower activities with respect to Mr. Richardson and Mr. Harvey.

In a November 4, 2008 statement, Roberta T. Thompkins, a friend of appellant, indicated that appellant told him that Mr. Wilkie stated at a conference that he should not get up to go to the bathroom unless "his bladder was about to burst." On October 10, 2008 Mr. Harvey stated that he did not hear Mr. Wilkie say to the attendees at the July 2008 conference that they could only leave if they were about to wet their pants. He noted that appellant stated to him, "What, they only want us to leave when we are about to wet our pants?" Appellant then told Mr. Harvey that he would not wet his pants and Mr. Harvey indicated that he told appellant that he would leave before wetting his pants. In an October 10, 2008 statement, Mr. Hall stated that Mr. Wilkie told him, Mr. Harvey and appellant that they were not to interrupt the speakers by unnecessarily leaving and entering the room during lectures. He did not recall ever being told not to use the restroom "even if your bladder bursts" or anything to that effect.

¹ Appellant indicated that he was told that he had to go through the chain of command before meeting with Mr. Bigham.

In a December 29, 2008 statement, Mr. Richardson stated that he was unable to answer his telephone on an occasion when appellant called due to an assignment from his supervisor which required immediate attention. In a January 6, 2009 statement, Mr. Hall indicated that his statement about Mr. Richardson ignoring him was only meant to be humorous, not to incite turmoil. He indicated that he told appellant he was not in any position to see whether Mr. Richardson actually ignored the telephone call. In a December 29, 2008 statement, Gregory Evans, a coworker, indicated that on August 13, 2008 appellant had a hostile tone when he asked Mr. Richardson why he did not answer the telephone.²

Appellant submitted several medical reports, including a July 14, 2008 report in which an attending clinical psychologist noted that he had an increase in depressive symptoms. The psychologist noted that he attributed this increase in symptoms to an interaction with his supervisor.

In a January 27, 2009 decision, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. It found that appellant did not submit sufficient evidence to show that he was harassed by supervisors or coworkers or that the employing establishment committed error or abuse with respect to administrative matters.

Appellant requested a hearing before an Office hearing representative. At the May 6, 2009 hearing, appellant testified that the witness statements and other evidence of record showed that he was subjected to harassment and that the employing establishment committed error and abuse with respect to several matters. In a July 14, 2009 decision, the Office hearing representative affirmed the Office's January 27, 2009 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.³ 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.⁴

² The record also contains a December 30, 2008 statement in which Mr. Bigham's secretary indicated that she made several attempts to have appellant meet with Mr. Bigham, but that his schedule prevented such a meeting taking place. In an undated statement, Mr. Bigham indicated that he was unable to meet with appellant during the time he requested a meeting.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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.⁵ 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.⁶

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.⁷ 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.⁸

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, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that harassment on the part of his supervisors and coworkers contributed to his claimed stress-related condition. He asserted that while attending a conference in Denver on July 9, 2008 his supervisor, Mr. Wilkie, told the attendees not to go to the restroom during the conference unless one's "bladder was about to burst." Appellant claimed that Mr. Wilkie also stated that another supervisor indicated that the attendees were not to leave their seats for any reason. He asserted that on August 13, 2008 he was deliberately ignored by Mr. Richardson, a coworker, when he called him on the telephone and he refused to answer and that Mr. Hall, another coworker, told him that Mr. Richardson was ignoring him. Appellant further claimed that Mr. Harvey, a coworker, harassed him on August 15, 2008 by asking him four times whether he got an email regarding a work team meeting that had recently been held.

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁹ However, for harassment to

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁷ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁸ *Id.*

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

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 are not compensable under the Act.¹⁰ In the present case, the employing establishment denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that he was harassed by his supervisors or coworkers.¹¹

Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment, but he not provide corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹² In fact, with respect to his claim that Mr. Wilkie told him not to go to the restroom unless his bladder was about to burst, Mr. Hall and Mr. Harvey testified that they were present at the conference and that Mr. Wilkie made no such comment. They indicated that Mr. Wilkie only asked that attendees try to avoid leaving during a speaker's talk for such matters as getting refreshments or answering cell phones.¹³ Moreover, Mr. Richardson testified that he did not in fact ignore appellant on an occasion when he called. Mr. Hall admitted that he stated that Mr. Richardson was ignoring him, but noted that he only intended to make a humorous comment. Not every statement uttered in the workplace will give rise to coverage under the Act and appellant has not shown how such an isolated comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.¹⁴ There is no evidence that Mr. Harvey harassed appellant on August 15, 2008 and in fact he admitted that he raised his voice to Mr. Harvey on that date. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant indicated that he sustained stress due to his attempts, between mid and late August 2008, to meet with Mr. Bigham, a deputy director for the employing establishment, to discuss work complaints. He also alleged that he was wrongly criticized for calling Mr. Richardson's supervisor at Harris Corporation. Appellant asserted that Mr. Wilkie did not adequately support him when he spoke to him about an interaction he had with Mr. Harvey. He also alleged that the employing establishment wrongly terminated him in late August 2008.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions and mishandled his requests to discuss problems with supervisors, the Board

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ *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).

¹² *See William P. George*, 43 ECAB 1159, 1167 (1992).

¹³ On appeal to the Board, appellant questioned the veracity of his coworkers' statements, but he did not present a valid reason for this belief. Ms. Thompkins, a friend of appellant, indicated that appellant told him that Mr. Wilkie stated at a conference that he should not get up to go to the bathroom unless "his bladder was about to burst." However, Ms. Thompkins was not present at the conference held on July 9, 2008. Even if Mr. Wilkie did make the comment attributed to him, such a comment, in and of itself, would not have risen to the level of harassment.

¹⁴ *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991). Moreover, Mr. Evans, a coworker, indicated that on August 13, 2008 appellant had a hostile tone when he asked Mr. Richardson why he did not answer the telephone.

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.¹⁵ Although such matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁶ 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.¹⁷ However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. For example, he did not submit the findings of grievances showing that the employing establishment committed error or abuse with respect to these matters.¹⁸ Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁹

CONCLUSION

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

¹⁵ 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).

¹⁶ *Id.*

¹⁷ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁸ It should be noted that Mr. Bigham and his secretary testified that they made honest attempts to set up a meeting with appellant.

¹⁹ 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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 14, 2009 is affirmed.

Issued: October 21, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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