

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

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| J.A., Appellant |) | |
| |) | |
| and |) | Docket No. 10-555 |
| |) | Issued: October 7, 2010 |
| DEPARTMENT OF TRANSPORTATION, |) | |
| FEDERAL AVIATION ADMINISTRATION, |) | |
| Fort Worth, TX, Employer |) | |

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 23, 2009 appellant filed a timely appeal from an October 1, 2009 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 established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 4, 2009 appellant, then a 49-year-old air traffic control specialist, filed a claim alleging that on April 23, 2009 he sustained mental stress due to factors of his federal employment. He noted that several times during the week his manager had informed him that there was no work available even though he had an accepted work injury. On April 29, 2009 appellant's physician prescribed anxiety medication that prevented him from driving. The record establishes that the Office had accepted appellant's claim for a left knee sprain and torn medial

meniscus under file number xxxxxx271. On January 14, 2009 appellant underwent a total knee arthroplasty.

In an April 24, 2009 memorandum, the employing establishment noted that appellant was unable to perform his job duties due to his loss of a medical clearance. While it had clerical and administrative duties available “on an irregular basis” within the restrictions documented on a duty status report (Form CA-17), the employer instructed him to call every day to see if work was available.

On April 29, 2009 appellant related that on April 23, 2009 John Frey, his supervisor, told him that the employer would not have any work for him on April 24, 2009. He asked Mr. Frey to put it in writing so he could notify the Office of the lack of work but Mr. Frey refused. Another supervisor told appellant that he would need to call in everyday to see if there was available work. Appellant became stressed at these instructions. His physician prescribed medication for his stress and also increased his pain medication. Appellant alleged that the employing establishment changed his schedule so he was unable to go to physical therapy and management initially told him that there was work available, but then changed its mind.

On May 14, 2009 the employing establishment controverted the claim. It noted that appellant had returned to work on April 20, 2009 with restrictions under file number xxxxxx271. Appellant filed a claim for a traumatic injury on April 29, 2009 because he had been refused light-duty work. The employer informed him on April 24, 2009 that it had clerical work within his restrictions but that on April 23, 2009, appellant informed his supervisor that he would be out due to stress until April 27, 2009.

On May 18, 2009 Mr. Frey related that appellant reported for work on April 20, 2009, as instructed by his supervisor. He told him to go to the training department for an assignment. The training manager could not find appellant later that day. Mr. Frey found him exiting the control tower. He adjusted appellant’s shift from a start time of 6:30 a.m. to 7:30 a.m. to coincide with that of the training manager. On April 22, 2009 Mr. Frey told him that there was no work available.

In response to the Office’s request for additional information, appellant related that he sustained an injury to his knee on March 6, 2008. On January 2009 he underwent a total knee replacement. Before appellant returned to work, he told his supervisor that he needed his schedule adjusted to attend physical therapy. On April 20, 2009 he returned to work. Mr. Frey told him to go to the training department. Appellant spent part of the day getting a computer password. Mr. Frey yelled at him because he did not answer a page and changed his shift even though appellant would be unable to attend physical therapy. On April 21 and 22, 2009 management told appellant to go home early because there was not enough work. On April 23, 2009 the employer advised him there would be no work on the following day. Appellant broke down crying at his physician’s appointment and was taken off work because of his mental condition. He noted that he had begun taking antidepressants as treatment under claim number xxxxxx271 and the employing establishment denied his request for a medical clearance. Appellant related: “I have handled stress over the years and the amount of stress that my employer forced upon me was far and beyond what a person could take. They would flip flop back and forth, first telling me that there was work, then changing their mind. This would happen several times a day.”

On June 18, 2009 Mark E. Gordon, a manager, noted that appellant took medication for depression while under file number xxxxxx271. He stated that the employer had “offered clerical and administrative duties, on an irregular basis, suitable to meet the restrictions documented on the CA-17.” Mr. Gordon asserted that appellant was not treated differently from other employees who had lost their medical clearance.

By decision dated October 1, 2009, the Office denied appellant’s claim on the grounds that he had not established an injury in the performance of duty. It found that he had not established any compensable employment factors.

On appeal, appellant related that the employing establishment instructed him to file the emotional condition claim in order to get continuation of pay under file number xxxxxx271 from April 24 to July 23, 2009, the date he was medically retired. He was told that he could not file a claim for compensation for the time lost from work under file number xxxxxx271 because he had filed an emotional condition claim. Appellant stated, “I only filed for the PTSD because the agency had told me that unless I filed a new claim, they would not fill out the paperwork and forward to DOL. I believe that since I was still on medication which would not allow me to work, I should be paid for 04/24/2009-07/23/2009.”

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.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

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.³ 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.⁴ In determining whether the employing establishment has erred or acted abusively, the Board will

¹ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

² *Gregorio E. Conde*, 52 ECAB 410 (2001).

³ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 556 (1991).

⁴ See *C.S.*, 58 ECAB 137 (2006); *William H. Fortner*, 49 ECAB 324 (1998).

examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁵

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.⁶ 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.⁷

ANALYSIS

Appellant did not allege that he developed an emotional condition due to the performance of his regular or specially assigned duties or as the result of a specific requirement imposed by his employment. Instead, he maintained that he sustained stress because the employer sent him home several times in a week because there was no work available within his restrictions. Appellant alleged that management initially told him there was work available for him but then changed its mind. The Board has held, however, that the assignment of work is an administrative function and not covered under the Act absent a showing of error or abuse.⁸ Additionally, perceptions of unfair treatment are not enough to establish error or abuse. A claimant must submit real proof that management did in fact commit error or abuse.⁹ The employing establishment maintained that it did not treat appellant any differently from other employees who had lost medical clearance. As he has not submitted any evidence of error or abuse, he has not established that the unavailability of work was a compensable factor.

Appellant further alleged that management changed his schedule so that he was unable to attend physical therapy appointments. The fact that management changed an employee's work schedule, however, does not bring the claim within coverage of workers' compensation. The employee must submit proof that there was error or abuse when management changed his schedule.¹⁰ Mr. Frey explained that he changed appellant's schedule to a start time of one hour later so that he would be working the same hours as the training manager. Appellant did not provide any evidence showing error or abuse by the employing establishment in changing his

⁵ *Jeral R. Gray*, 57 ECAB 611 (2006); *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁶ *A.K.*, 58 ECAB 119 (2006); *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁷ *Id.*

⁸ *V.W.*, 58 ECAB 428 (2007); *see also Jeral R. Gray*, *supra* note 5.

⁹ *L.S.*, 58 ECAB 249 (2006).

¹⁰ *Id.*

schedule to a start time of one hour later and thus has not shown a compensable employment factor.¹¹

On appeal appellant argues that he is entitled to compensation for time lost from work because there was no work available due to his physical limitations from his accepted knee condition in file number xxxxxx271. This decision does not preclude appellant from filing a claim for compensation under file number xxxxxx271.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2009 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 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

¹¹ The Board has held that a change in an employee's duty shift may, under certain circumstances, be a factor of employment to be considered in determining if an injury has been sustained in the performance of duty. These cases, however, involve a fluctuating or rotating work schedule or a distinct reassignment from an existing shift, such as from a day shift to a night shift. *Id.*; see also *Gloria Swanson*, 43 ECAB 161 (1991).