

FACTUAL HISTORY

On March 23, 2009 appellant, then a 45-year-old industrial hygienist, filed an occupational disease claim (Form CA-2) alleging that on March 5, 2009 he first realized that his stress with diarrhea, insomnia, nausea, headaches, anxiety and depression were caused by his federal employment. In a narrative statement, he attributed his emotional conditions to being discriminated against based on his age, race and sex and harassed by management in several work incidents since July 1, 2006. Management gave appellant poor performance ratings in 2007 and 2008. Appellant contended that his poor appraisals were due to management's delay in providing him with a rating chain or performance standards and expectations in 2006 and 2007. On March 4, 2009 a Colonel Beus advised appellant that management made errors in his 2007 performance appraisal, but refused to change the errors.

On September 18, 2006 appellant challenged the Corps of Engineers' asbestos plan. He alleged that Lieutenant Colonel Beverly Jefferson threatened him with harmful actions if he discussed his concerns about the plan with anyone other than herself.

Appellant was not notified about the relocation of his office and equipment from November through December 6, 2006. He was concerned about the electrical plan for his equipment and possible electrical problems. Appellant received instructions from Sergeant Guy Claudy regarding the use of surge protectors which violated the National Electrical Code. Management retaliated against him for raising safety concerns. On December 6, 2006 appellant's concerns were substantiated by an outside electrician. He was reprimanded by a Colonel Degenhardt because he discussed his safety concerns with a commander and the union. On December 7, 2006 appellant was counseled by Lt. Col. Jefferson and Second Lieutenant Jacob J. Derivan for his actions. He was not allowed to have a witness or union representative present at the counseling session. Col. Degenhardt and Lt. Col. Jefferson later agreed to remove all documentation related to his December 7, 2006 counseling session.

On January 4, 2007 appellant's noise survey results were questioned by Col. Degenhardt, who stated that appellant required greater supervision. On July 12, 2007 his work duties were limited by Lt. Col. Jefferson and Lt. Derivan. Appellant was excluded from meetings that took place from July 16 through 18, 2007 regarding a program that he managed. He had limited participation in meetings that took place from August 20 through 24, 2007. Appellant's memoranda and reports were changed commencing August 1, 2007. On August 1, 2007 Lt. Derivan admitted to editing appellant's documents. On February 17, 2009 Lt. Col. Jefferson and Lt. Derivan advised appellant that no changes had been made to his reports. On February 18, 2009 an employing establishment commander stated that she was aware that Scott Bentley and Dan Mitchell, employees, were making changes to appellant's documents. On June 6, 2008 Lt. Derivan changed appellant's work duties.

From August 27, 2007 through March 4, 2009 appellant experienced problems accessing programs and drives on his computer. The computer drives were changed. The computer displayed blue screens of death.

On November 15, 2007 Lt. Derivan accused appellant of wrongdoing in his work performance. On January 10, 2008 he advised appellant that no retraining would be made available to him and his performance appraisal would be subjective in nature. On January 14,

2007 Lt. Derivan issued a letter proposing to suspend appellant for 14 days.² On February 25, 2008 he complained about appellant's lack of progress on a program document. On October 17, 2008 Lt. Derivan accused appellant of releasing records in violation of a new unwritten employing establishment policy. On February 12, 2009 Lt. Col. Jefferson gave appellant a copy of a performance improvement plan (PIP), but he took it back to provide clarification of its contents. On February 17, 2009 she placed him on the PIP. Later on that date, Lt. Derivan issued a letter proposing to remove appellant from his industrial hygienist position. On February 25, 2009 Lt. Col. Jefferson wanted appellant to falsely state that no records existed in response to a Freedom of Information Act (FOIA) request. On February 26, 2009 she wanted appellant to send records to an e-mail address in violation of the employing establishment's new records release policy. Lt. Col. Jefferson threatened him if he did not perform the requested task. Appellant noted that Lt. Derivan had accused him of violating this same policy on October 16, 2008. On March 2, 2009 Lt. Col. Jefferson planned to assign so much work to appellant that he could not perform all of the work. She refused to clarify her work instructions. Lt. Col. Jefferson stated that she wanted appellant to fail or be fired. On March 4, 2009 Lt. Derivan told appellant that he acted against him on behalf of Lt. Col. Jefferson.

Management allegedly conducted several searches of appellant's office and seized and damaged his personal property. On January 29, 2008 appellant's computer was accessed by an unknown individual. On February 13, 2008 he reported to Lt. Derivan and the employing establishment police that personal items were taken from his desk drawers. Management refused to further investigate the incident even though some of appellant's missing items were found to be in Lt. Col. Jefferson's possession. These items were returned to appellant on February 14, 2008. On March 3, 2008 appellant discovered microphones on his computer. After contacting the employing establishment's information management division, the microphones disappeared. Management refused to explain why the microphones were placed on appellant's computer. On August 14, 2008 Lt. Derivan was in appellant's office using his computer. He refused to explain his presence. After Lt. Derivan left his office, appellant tried to log onto the computer. It displayed blue screens of death. On October 30, 2008 Lt. Derivan replaced appellant's chair without permission. On December 15, 2008 appellant reported to Lt. Derivan and the employing establishment police that his office had been vandalized. Management entered appellant's office and broke his personal picture frames and radio. Management and the police refused to investigate his complaint. On February 13, 2009 management removed documents from appellant's office. Appellant made this discovery on February 18, 2009 and reported the incident to management and the employing establishment police. On February 23, 2009 someone had been in appellant's office. Appellant found magazines on his desk. He reported the incident to Lt. Col. Jefferson who stated that she would investigate the incident. On March 13, 2009 Lt. Col. Jefferson called appellant three times at home on his day off work demanding to know the whereabouts of occupational health records. She threatened to search and seize the records from his office. Appellant did not consent to the subsequent search.

From April 22 through July 28, 2008 management failed to correct changes made to appellant's pay and leave. On October 6 and 21, and November 8 2008 appellant requested reimbursement for travel duty (TDY) status he was on from October 1 through 3, 2008 and three days in November 2008. Management did not make the requested changes or reimbursement payments.

² Appellant was suspended from April 7 through 18, 2008.

On November 7, 2008 appellant filed an Equal Employment Opportunity (EEO) complaint against Lt. Col. Jefferson, Lt. Derivan and Olga Madigan, an employee, alleging discrimination regarding his leave, pay and travel reimbursements. On February 9, 2009 he appealed the employing establishment's dismissal of his complaint.

Appellant had difficulty obtaining a Form CA-2 and authorization for examination and/or treatment (Form CA-16) from management for his emotional condition claim.

Medical reports dated March 3 and 19, 2009 stated that appellant had an emotional condition causally related to his employment. Appellant was intermittently disabled for work.

By letter dated April 24, 2009, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested factual and medical evidence. The Office requested that the employing establishment respond to appellant's allegations and provide a copy of his position description and physical requirements.

In a May 5, 2009 letter, appellant noted the grievances he filed against Lt. Derivan and Lt. Col. Jefferson regarding his 2006 and 2007 performance appraisals, 14-day suspension for misconduct and leave, pay and TDY reimbursement. He stated that the performance ratings were in retaliation for failing to perform surveys and identifying safety and health problems and fraud, waste and abuse regarding its flawed renovation and design plan. Appellant's 14-day suspension was in retaliation for alleging that his reports were changed by management and filing a grievance regarding management's failure to correct his pay and leave, and reimburse his TDY expenses. Management also retaliated against him for issuing citations to the employing establishment as a union steward assigned to OSHA inspections. Appellant indicated that a missing notebook found in Lt. Col. Jefferson's possession on February 13, 2008 was taken from his office on February 12, 2008. The notebook contained detailed descriptions of meetings between him, management and his union representatives and incidents that occurred at work. Appellant stated that the employing establishment police refused to investigate the December 15, 2008 incident citing the February 12, 2008 incident. The police also did not investigate employing establishment officers. Appellant was advised by the employing establishment's information management division that his computer hard drive had been removed six times between June 24 and December 11, 2008. He contended that it was removed by management in retaliation for filing grievances regarding his 14-day suspension and leave and earning issues. It was also removed because appellant advised Lt. Derivan and Lt. Col. Jefferson about ways to remedy his hostile work environment and requested clear evaluation standards. The computer hard drive was removed due to appellant's request for clarification from Lt. Derivan regarding clarification on his PIP. Appellant also spoke to the United States office of special counsel on his government telephone and sent e-mails to this office *via* his government computer. He released records related to an employing establishment building to the office of special counsel. On November 20, 2008 Chris Callahan, an information management employee, was instructed by management to ask him to download his government camera to a network computer in violation of the employing establishment's computer use policy. Appellant stated that the office of special counsel's January 2009 decision found it likely that management failed to perform adequate industrial hygiene testing in violation of laws, rules and/or regulations. The decision also found that the actions of Lt. Derivan and Lt. Col. Jefferson constituted an abuse of authority and created the potential for substantial and specific danger to public health and safety. Following the issuance of this decision, management gave appellant a copy of the PIP on

February 12, 2009 and issued a letter proposing to remove him from employment on February 17, 2009.

In a July 29, 2009 letter, Janice Sifford, a human resources specialist, advised that appellant's grievances were not upheld. Although an arbitration hearing recently concluded and two were pending, no formal ruling had been issued in support of his allegations of impropriety or abuse by the employing establishment. Ms. Sifford noted that a July 24, 2009 decision dismissed appellant's EEO complaint.

In another July 29, 2009 letter, Colonel Andrea E. Crunkhorn, a supervisor, stated that based on appellant's performance deficiencies, he was retrained with oversight and multiple TDY trips. The Corps of Engineers consulted with him and the Occupational Safety and Health Administration (OSHA) reviewed additional safety hazards. Col. Crunkhorn stated that appellant refused expert guidance and assistance. He failed to accurately transfer raw data from his instrumental testing to his reports. Appellant changed appendices based on an old report which inflated the original data. He repeatedly failed to effectively and appropriately communicate his findings. After nearly two years of training, appellant incorrectly advised employees that pulmonary toxins existed in their workplace in October 2008. None of his allegations of environmental hazards were substantiated in buildings surveyed by the employing establishment or OSHA. Col. Crunkhorn stated that the special counsel had not reached a conclusion regarding appellant's allegations. The investigation was ongoing. Col. Crunkhorn advised that appellant made no mention of any problems with his TDY reimbursements, leave and pay, retaliation, workplace harassment or computer support problems. His supervisors had worked diligently to correct his pay issues.

In a July 30, 2009 decision, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty as he failed to establish a compensable factor of his employment.

By letter dated August 25, 2009, appellant requested an oral hearing before an Office hearing representative.

Following a December 10, 2009 telephonic hearing,³ appellant submitted OSHA notices announcing meetings to discuss unsafe or unhealthy working conditions at the employing establishment. The police investigative report regarding the December 15, 2008 incident indicated that a picture had fallen off the wall in appellant's office which left items in disarray. Further check of the office found everything in order. In letters dated April 2 and May 21, 2008, appellant contended that he received letters addressed to him that had already been opened.

In a February 13, 2008 memorandum, Lt. Derivan advised that he locked all doors leading to appellant's office area before leaving work on February 11, 2008. Only individuals with permissible access could enter the area. Lt. Derivan had requested that employees ensure that all doors were locked before leaving the building. In a January 14, 2009 memorandum, Lt. Derivan stated that appellant advised him about the December 15, 2008 incident. Appellant

³ Appellant requested a telephonic hearing because the scheduled oral hearing location was 600 miles one way from his and his representative's residences.

did not know what happened. Lt. Derivan reported the incident to Lt. Col. Jefferson and advised him to report the incident to military police.

In a February 4, 2010 decision, an Office hearing representative affirmed the July 30, 2009 decision, finding that the evidence failed to establish a compensable factor of appellant's employment.

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 or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁴ 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁵

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.⁶ 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.⁷

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.⁸ 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.⁹

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

⁵ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁶ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁷ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁸ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁹ *Id.*

ANALYSIS

Appellant alleged that he sustained an emotional condition due to several incidents at the employing establishment. The Board must determine 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.¹⁰ 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.¹¹

Appellant's contentions regarding poor performance appraisals,¹² relocation of office and equipment,¹³ issuance of letters of reprimand, suspension and removal, counseling sessions, placement on a PIP,¹⁴ termination of employment, denial of union representation,¹⁵ monitoring of work,¹⁶ assignment of work¹⁷ and office equipment,¹⁸ failure to conduct investigations,¹⁹ handling of pay, leave and TDY issues,²⁰ filing of grievances²¹ and processing of compensation claims²² are administrative matters and not compensable absent a showing of error or abuse on the part of the employing establishment. He contended that Col. Beus stated that management erred in rating his 2007 performance. Appellant further contended that Lt. Derivan stated that his future performance appraisals would be subjective and that he would not be retained. He alleged that Lt. Derivan admitted that he edited his reports and acted against him on behalf of Lt. Col. Jefferson. Appellant contended that a commander advised him that Mr. Bentley and Mr. Mitchell changed his reports. He also contended that Lt. Col. Jefferson requested that he

¹⁰ 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).

¹¹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991). *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹² *David C. Lindsey, Jr.*, 56 ECAB 263, 271-72 (2005).

¹³ *Barbara J. Nicholson*, 45 ECAB 803 (1994).

¹⁴ *Robert Breeden*, 57 ECAB 622 (2006).

¹⁵ *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Apple Gate*, 41 ECAB 581, 588 (1990).

¹⁶ *Lori A. Facey*, 55 ECAB 217, 224 (2004).

¹⁷ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁸ *Harriet J. Landry*, 47 ECAB 543 (1996).

¹⁹ *Ernest St. Pierre*, 51 ECAB 623 (2000).

²⁰ *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997).

²¹ *Michael A. Salvato*, 53 ECB 666, 668 (2002).

²² *David C. Lindsey*, 56 ECAB 263 (2005).

make a false statement regarding the existence of records in response to a FOIA request which violated a records release policy. Appellant alleged that Lt. Derivan had previously accused him of violating the same policy. He further alleged that the office of special counsel's January 2009 decision found that Lt. Derivan and Lt. Col. Jefferson abused their authority and the employing establishment's industrial hygiene testing created potential safety and health dangers. Appellant contended that management and the employing establishment police failed to investigate the incidents involving management's unauthorized entrance into his office and seizure and damage to his personal property. He further contended that the information management division acknowledged that his computer hard drive had been removed six times between June 24 and December 11, 2008 by management. The Board finds that appellant did not submit any evidence such as, witness statements from Col. Beus, the commander and the employee from the information management division, to establish that the employing establishment erred or acted abusively in rating his performance, relocating his office and equipment, taking disciplinary actions against him, denying his request for union representation, monitoring his work, assigning his work and office equipment, conducting its investigations, handling of his pay, leave and TDY issues and processing his compensation claims. Appellant stated that documents related to his December 7, 2006 counseling session were removed from his record. The mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse.²³ The record does not contain a final decision finding that the employing establishment committed error or abuse in giving appellant a poor performance ratings or a 14-day suspension and handling his leave, pay and TDY reimbursement issues.

Regarding appellant's work performance, Colonel Crunkhorn stated that he failed to accurately transfer raw data from his instrumental testing to his reports. She further stated that he changed appendices based on an old report which inflated the original data. Colonel Crunkhorn related that appellant failed to effectively and appropriately communicate his findings. She noted that the Corps of Engineers consulted with him and OSHA reviewed additional safety hazards, but he refused expert guidance and assistance. Colonel Crunkhorn stated that appellant was retrained with oversight and multiple TDY trips, yet in October 2008 he incorrectly advised employees that pulmonary toxins existed in their workplace. She stated that none of his allegations regarding the existence of environmental hazards in the employing establishment's buildings were substantiated by its surveys of the buildings. The Board finds that notices of OSHA-sponsored meetings regarding unsafe and unhealthy working conditions did not specifically identify such conditions at the employing establishment. Regarding the issuance of an adverse decision by the special counsel's office, Colonel Crunkhorn stated that a conclusion had not been reached regarding appellant's leave, pay and TDY issues. She stated that the investigation was ongoing. Colonel Crunkhorn related that appellant's supervisors had worked diligently to correct his pay issues. Ms. Sifford stated that a July 24, 2009 decision dismissed his EEO complaint regarding management's poor performance ratings, 14-day suspension and handling of his leave, pay and TDY reimbursement issues. She further stated that, although an arbitration hearing recently concluded and two were pending, no formal ruling had been issued in support of his allegations of impropriety or abuse by management. Both Lt. Col. Jefferson and Lt. Derivan denied editing appellant's reports.

In response to appellant's complaint that management and police failed to investigate his complaints that his office was searched and personal property was seized and damaged by

²³ *Dennis J. Balogh, 52 ECAB 232 (2001).*

management, Lt. Derivan stated that appellant's office area was secure on February 12, 2008. He personally made sure that all doors leading to his work area were secured before he left work on February 11, 2008. Lt. Derivan previously instructed employees to ensure all doors were locked before leaving the building. He related that, after appellant reported the December 15, 2008 break-in and property damage to him, he advised appellant to report the incident to police. The police investigative report described the December 15, 2008 incident stating that a picture fell from the wall in appellant's office which caused items to become disarrayed. The report stated that everything was in order upon further investigation.

In light of the foregoing evidence, including the statements of Colonel Crunkhorn, Ms. Sifford and Lt. Derivan, the Board finds that management did not act unreasonably in the above-noted administrative and personnel matters. The Board finds that appellant did not establish a compensable employment factor.

Appellant alleged that he was overworked as he could not perform all of the work Lt. Col. Jefferson assigned to him. He contended that she refused to clarify her work instructions. Appellant alleged that Lt. Col. Jefferson wanted him to fail or be fired. He stated that she assigned him a task that violated the employing establishment's records release policy. The Board has held that while overwork may be a compensable factor of employment it must be established on a factual basis to be a compensable employment factor.²⁴ Appellant did not submit any evidence to substantiate his allegation. The Board finds that he has not established a compensable employment factor.

Appellant contended that he was generally harassed and discriminated against at the employing establishment in the above-noted incidents. Actions of a claimant's supervisor or coworker which the claimant characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.²⁵ An employee's charges that he or she was harassed or discriminated against, is not determinative of whether or not harassment or discrimination occurred.²⁶ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.²⁷ Appellant contended that Lt. Col. Jefferson, Lt. Derivan and Col. Degenhardt threatened and retaliated against him for identifying and raising safety and health concerns and fraud, waste and abuse regarding its flawed renovation and design plan, failing to perform surveys, alleging that his reports were edited, filing a grievance regarding his pay and leave, and TDY reimbursement and issuing citations to the employing establishment based on his OSHA inspections. He further contended that Lt. Col. Jefferson threatened to search his office for records and take harmful action against him if he did not make a false statement regarding the existence of documents related to a FOIA request. Appellant did not submit any witness statements to support his allegations. Although he stated that Lt. Derivan

²⁴ *Sherry L. McFall*, 51 ECAB 436 (2000).

²⁵ *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

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

²⁷ *See Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

admitted to harassing him on behalf of Lt. Col. Jefferson, he did not submit a statement from him in support of his contention. The Board finds that appellant has failed to establish that he was harassed and discriminated against by the employing establishment.²⁸

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

²⁸ As appellant has not substantiated a compensable factor of employment as the cause of his emotional condition, the medical evidence regarding his emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).