

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

R.K., Appellant)

and)

DEPARTMENT OF THE ARMY, U.S. ARMY)
TANK COMMAND AUTOMOTIVE)
ARMAMENT COMMAND, Warren MI,)
Employer)

Docket No. 10-1528
Issued: April 4, 2011

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 18, 2010 appellant filed a timely appeal from the April 23, 2010 decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he developed an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 19, 2009 appellant, then a 41-year-old traffic management specialist, filed an occupational disease claim alleging that he developed an emotional condition due to being

¹ 5 U.S.C. § 8101 *et seq.*

harassed by coworkers and his supervisor and being overworked and understaffed. He became aware of his condition and realized it was caused by his work on January 9, 2009. Appellant stopped work on January 9, 2009 and returned to work on April 13, 2009.

On May 8, 2009 the Office asked appellant and the employing establishment to provide additional evidence.

In a March 23, 2009 statement, appellant alleged that he was passed over for promotions in favor of less qualified people. In 2001, Walt Shaffer was promoted to transportation supervisor and in 2003 Thomas Hinkley was promoted to supervisor but neither candidate had experience and relied on appellant to resolve problems. In 2004, appellant was assigned two interns to train without assistance and was also passed over for promotion when Mr. Hinkley hired another candidate. In 2005, he was given the responsibilities of a retired team leader due to his experience. When appellant was later made team leader, his job description did not change. In March 2006, he applied for a transportation and packaging supervisor position but the job was abolished. In November 2006, Edward Woolverton became the transportation section head and promoted Marlene Koedding to a Grade 13 logistics management specialist although neither was qualified. In December 2006, coworker Ray Hasenyager harassed appellant about taking leave and in a February 2007 team meeting Mr. Hasenyager called him a bully and turned the team members and Ms. Koedding against him. Appellant alleged that in April 2007 Mr. Hasenyager mocked him and other team members failed to cooperate with him. In August 2007, Ms. Koedding assigned him another project and he expressed concern about being overwhelmed with new missions and staff shortages. In October 2007, Beth Nickell became the head of the transportation unit and appellant stated that she was unqualified. She made him team leader but did not change his job description or provide him with instructions on his new duties. On October 20, 2007 appellant applied for a traffic management specialist job but another candidate was selected. He asserted that, in October and November 2007, Ms. Nickell and Anna Morris gave him assignments without guidance or assistance. On January 17 and 18, 2008 appellant requested his performance standards but Ms. Nickell did not provide mid-term counseling on the standards until June 16, 2008, eight months after they were due. He alleged that the standards were written so that he could not exceed them. Appellant asserted that, on January 18, 2008, a coworker, was assigned to a special project which left appellant's unit with only two staff members such that he had to request overtime to complete his duties.

Appellant alleged that, in March 2008, he interviewed for a job and the interviewer stated that Mr. Woolverton told him that appellant was "very confrontational." He asserted that he was not hired because of Mr. Woolverton's remark. Appellant stated that, on March 18, 2008, he received conflicting instructions from Ms. Nickell and Ms. Morris about attending mandatory training and completing other assigned tasks. On June 13, 2008 he requested a desk audit to obtain a promotion but Mr. Woolverton refused to authorize the audit. Appellant alleged that, on June 23 and July 14, 2008, he applied for a supervisory position but the position was cancelled. On September 22, 2008 he requested a transfer but the transportation manager noted having no power to transfer appellant. Appellant stated that, in the fall 2008, Mr. Woolverton pounded his hand on his desk and yelled at him in front of team members and later apologized. He noted that, in November 2008, appellant was assigned two new people to train and was overwhelmed. In January 2009, he noted planning a luncheon for a retiring colleague but supervisors did not attend. Appellant stated that, when the coworker left, he had no help and performed all the work

in a five-person office. He asserted that after he filed several grievances Mr. Woolverton cancelled job announcements and wrote announcements so that appellant would not qualify.

Appellant submitted treatment notes from a social worker who noted that he could not work from January 29 to March 17, 2009. He was treated by Dr. Pedor OPOCHINSKY, a Board-certified psychiatrist, on April 10, 2009 for job-related stress. Appellant diagnosed major depression and adjustment disorder with mixed emotions.

The employing establishment submitted an April 20, 2009 statement from Mr. Woolverton who asserted that all of appellant's duties were reflected in his position description. Mr. Woolverton noted that many organizational changes occurred during the realignment of personnel staffing to comply with impending base realignment and closure restructuring. He noted that appellant erroneously perceived the changes to be against him personally. In an August 5, 2009 statement, Mr. Woolverton noted that in 2006 Ms. Morris realigned the teams which resulted in Mr. Shafer being moved to team leader. No position was abolished as alleged by appellant. Mr. Woolverton noted that there were personality conflicts in the transportation team that he believed resulted from appellant's strong personality, which was not appreciated by others. He noted that Mr. Hasenyager took a downgrade to get away from appellant. Mr. Woolverton noted that another reorganization occurred in 2007 and Ms. Morris internally reorganized and assigned the transportation mission to Ms. Nickell and temporarily promoted Ms. Koedding to chief of inventory. With regard to appellant's allegation that he spoke disparagingly of appellant to an administrative interviewer, Mr. Woolverton denied knowing or speaking to the interviewer. Mr. Woolverton noted assuming the duties of the asset management group on April 1, 2008 and the position of transportation supervisor was relocated and restructured to reduce the high supervisor to employee ratio within the group. He noted that appellant requested a desk audit in June 2008, to obtain a promotion but he denied this request noting that it was unnecessary because this was a new position with a new job description and not an expansion of appellant's job duties. Mr. Woolverton noted that appellant filed a union complaint about the cancellation of a job announcement, but Mr. Woolverton explained that the position was cancelled because it was improperly coded.

With regard to the allegation that Mr. Woolverton pounded on a desk, he noted that in October 2008 he confronted appellant for failure to complete an assignment and slapped the top of appellant's desk to get his attention. He denied pounding on the desk. Mr. Woolverton noted that appellant failed to attend a meeting of high priority, without informing his supervisors. He denied appellant's assertion that he worked with only one other staff member and noted that from December 2008 to January 2009 appellant had two coworkers to assist in the unit and when a coworker retired another person was hired in January 2009. Mr. Woolverton noted that at no time were there less than three employees on board. With regard to appellant's allegation about supervisors not attending a retirement luncheon, Mr. Woolverton noted that the retiring employee informed management that she did not want a luncheon. He further noted that appellant was not given any additional assignments, all his assignments were normal transportation mission requirements and appellant was very adept at completing his work. Mr. Woolverton noted that current statistics from April to July 2009 revealed appellant completed his assignments 67 percent of the time.

On August 28, 2009 appellant indicated that he could not provide additional witness statements as coworkers had retired or were reassigned. He submitted an April 16, 2007 e-mail from Ms. Koedding to Mr. Woolverton, who noted that the traffic management specialist did not cooperate with appellant as team leader and failed to provide status reports and summaries when requested. Ms. Koedding further noted that appellant was mocked by a coworker. Appellant submitted a January 20, 2009 Equal Employment Opportunity (EEO) complaint alleging that he was discriminated against because of his age and subjected to reprisals for prior EEO activity and grievances filed. In an EEO witness statement, Mr. Woolverton denied discriminating against appellant. He further noted that he did not cancel three vacancy announcements based on appellant filing grievances; rather, the vacancies were cancelled because they had the wrong career program designator, there was a lack of qualified candidates and an incorrect job title and occupational series were noted. Mr. Woolverton stated that he did not add duties to an announcement to purposefully disqualify appellant from a vacant position nor did he preselect candidates for a position. In an August 31, 2009 e-mail, Ms. Koedding recalled a February 2007 staff meeting where there were unfriendly words between appellant and Mr. Hasenyager but she did not remember the exact words.

In a decision dated October 23, 2009, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.

On October 27, 2009 appellant requested a telephonic hearing which was held on February 16, 2010. He submitted a copy of his March 23, 2009 statement and a note from Dr. Opochinsky, both previously of record.

In an April 23, 2010 decision, the hearing representative affirmed the October 23, 2009 Office decision.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.²

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 Act.³ On the other hand the disability is not covered

² *George H. Clark*, 56 ECAB 162 (2004).

³ 5 U.S.C. §§ 8101-8193.

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

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 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

When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.⁷ Appellant did not clearly allege that specific work duties caused his emotional condition. He alleged that his claimed condition arose because he was overworked and understaffed. Appellant stated that, the transportation staff normally consisted of five people but on January 18, 2008, his unit was left with only two members and he asserted that, January 2009, after a coworker's retirement he performed all of the work in a five-person office. The Board has held that overwork, when substantiated by sufficient factual information to corroborate appellant's account of events, may be a compensable factor of employment.⁸ However, the record does not substantiate his contentions that he was overworked or understaffed. In an August 5, 2009 statement, Mr. Woolverton noted that although the transportation team normally consisted of five people, the agency was also restructuring and that at no time were there less than three employees in the unit. He also stated that appellant was not given any additional assignments, all his assignments were normal transportation mission requirements that fell within his job description and that appellant was very adept at completing his work. The Board finds that the evidence is insufficient to establish overwork allegations as Mr. Woolverton explained the staffing variations and advised that appellant was not given additional duties. Thus, this is not a compensable factor.

Appellant made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,⁹ the Board held that an employee's emotional reaction to administrative

⁴ See *Lillian Cutler*, 28 ECAB 126 (1976).

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

⁶ *Id.*

⁷ *Penelope C. Owens*, 54 ECAB 684 (2003); see *Lillian Cutler*, *supra* note 4.

⁸ *Bobbie D. Daly*, 53 ECAB 691 (2002).

⁹ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁰

Appellant asserted that he was passed over for a promotion a number of times and people of lesser qualifications were selected. He noted that there was a general lack of promotion potential in his unit and that promotion announcements were mishandled by his supervisor. Appellant stated that, on June 13, 2008, he requested a desk audit to obtain a promotion but Mr. Woolverton refused to authorize the audit and on September 22, 2008 he sought a transfer which was denied. The granting or denial of a request for a transfer and the assignment to a different position are administrative functions that are not compensable factors of employment under the Act, absent error or abuse, as they do not involve appellant's ability to perform her regular or specially assigned work duties but rather constitute appellant's desire to work in a different position.¹¹ Appellant has not established a compensable employment factor in this regard. Mr. Woolverton's April 20 and August 5, 2009 statements, noted that many organizational changes and staff realignment occurred due to impending base realignment and closure restructuring that affected job vacancies. He explained that no position was abolished to avoid giving appellant a promotion and explained that some jobs were eliminated due to reorganization or to reduce the high supervisor to employee ratio. Mr. Woolverton explained that he denied appellant's request for a desk audit, as it was unnecessary because this was a new position with a new job description and not a change in appellant's duties. He denied making disparaging remarks in March 2008 about appellant to a potential employer and there is no evidence otherwise supporting appellant's assertion. Appellant has presented no corroborating evidence to support that the employer acted unreasonably with regard to his promotion and transfer requests.

Appellant alleged that in 2004 and November 2008, he was assigned two interns to train without assistance and in 2005 and 2007 he was given all the responsibilities of the team leader but his position description was not changed to reflect his new duties. In August 2007, he alleged that Ms. Koedding assigned him a project and he expressed concern about being overwhelmed with new missions and inadequate staffing. In October and November 2007, appellant alleged that Ms. Nickell and Ms. Morris gave him missions to complete without guidance or assistance. The Board notes that the assignment of work is an administrative function¹² and the manner in which a supervisor exercises his or her discretion falls outside the

¹⁰ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹¹ *Id.*; see also *Peter D. Butt Jr.*, 56 ECAB 117 (2004). The Board has also held that the failure to be promoted is not compensable as it does not involve the employee's ability to perform his regular or specially assigned duties, but constitutes the employee's desire to work in a different position. *C.S.*, 58 ECAB 137 (2006).

¹² *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

ambit of the Act. Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.¹³ The Board finds that she has not offered sufficient evidence to establish error or abuse regarding his work assignments. The evidence does not establish that the employing establishment acted unreasonably in assigning work. In an April 20, 2009 statement, Ms. Woolverton noted that appellant's position description reflects that all assigned duties were within his description. He further noted that appellant was not given any additional assignments.

Appellant asserted that on January 17 and 18, 2008, he requested his performance standards from his supervisor, Ms. Nickell and she failed to provide mid-term counseling on the standards until June 16, 2008, eight months after they were due. He further alleged that the standards were written in a way that he could never have exceeded them. Appellant also alleged that he received conflicting instructions from Ms. Nickell and Ms. Morris on March 18, 2008 regarding attending a mandatory training and completing other assigned tasks. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that employees will at times dislike the actions taken by their supervisors, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.¹⁴ The Board has also held that the handling of evaluations is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.¹⁵ Appellant presented no corroborating evidence to support that the employer's actions in these matters rose to the level of compensable error or abuse. There is no evidence substantiating that the employer acted unreasonably in these matters.

Appellant alleged that he was harassed by management and coworkers. He asserted that Mr. Hasenyager harassed him about using leave, called him a "bully" during a February 2007 team meeting, mocked him and turned the other team members against him. Appellant alleged that, after filing grievances, Mr. Woolverton cancelled job announcements, wrote job announcements so that appellant would not qualify and sabotaged a job opportunity by making disparaging remarks about appellant to the interviewer. He also stated that, in 2008, Mr. Woolverton pounded his hand on his desk and yelled at him in front of other team members.

As noted above, matters related to promotions and job assignments are administrative in nature and appellant did not establish that the employer acted unreasonably in these matters. With regard to the other matters alleged, to the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁶ However, for harassment to

¹³ See *Peter D. Butt Jr.*, *supra* note 11 (allegations such as improperly assigned work duties, which relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties do not fall within the coverage of the Act); see *Barbara J. Latham*, 53 ECAB 316 (2002).

¹⁴ See *Marguerite J. Toland*, 52 ECAB 294 (2001).

¹⁵ See *supra* note 11.

¹⁶ *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 did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁷

The factual evidence does not support appellant's claim of harassment. Appellant noted filing an EEO claim for harassment and discrimination but the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁸ None of the information submitted by him regarding EEO matters showed that the employer acted improperly. Appellant submitted an e-mail from Ms. Koedding dated April 16, 2007 who noted that the traffic management specialists did not cooperate with appellant as team leader, failed to provide status reports and summaries and mocked appellant. The Board notes that it is unclear how this general mention of lack of cooperation and mocking rises to the level of compensable harassment. It is unclear what statements were made to mock appellant, what the lack of cooperation entailed and the duration of such actions. Ms. Koedding recalled a meeting in February 2007 where there were unfriendly words between appellant and Mr. Hasenyager but she did not remember exactly what was stated. Likewise, Mr. Woolverton denied harassing or discriminating against appellant. He further denied that he disparaged appellant to an interviewer. The evidence is insufficient to establish these matters as compensable work factors.

To the extent appellant is alleging that he was verbally abused by Mr. Haysenger or Mr. Woolverton, the Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.¹⁹ The records support that Mr. Woolverton slapped appellant's desk to get his attention and spoke frankly regarding appellant's failure to attend a priority meeting but this is insufficient, by itself, to warrant a finding that the matters amounted to verbal abuse.²⁰ Mr. Woolverton provided a reasonable explanation for his actions. He denied acting inappropriately in the matter and also explained that appellant's strong personality was the reason for conflicts and that Mr. Haysenger took a voluntary downgrade to get away from appellant. Appellant did not otherwise submit evidence to support that Mr. Woolverton's or Mr. Haysenger's actions constituted verbal abuse.

Consequently, appellant has not established his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.²¹

CONCLUSION

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

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

¹⁸ *James E. Norris*, 52 ECAB 93 (2000).

¹⁹ *T.G.*, 58 ECAB 189 (2006).

²⁰ *Peter D. Butt Jr.*, *supra* note 11.

²¹ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board