

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

R.G., Appellant

and

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Las Vegas, NV, Employer

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Docket No. 10-947
Issued: April 25, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 24, 2010 appellant filed a timely appeal from a December 4, 2009 decision of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review 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 March 5, 2009 appellant, then a 56-year-old internal revenue agent, filed an occupational disease claim alleging that on August 9, 2006 he first realized his chronic

¹ 5 U.S.C. § 8101 *et seq.*

depression was due to his indefinite suspension from pay and duty.² He attributed his condition to a June 5, 2006 letter proposing to suspend him indefinitely and his suspension beginning August 6, 2006. Appellant noted that an arbitrator found the suspension did not promote the efficiency of the agency and had ordered his reinstatement. Due to the indefinite suspension he stated he felt targeted, violated, embarrassed and humiliated.

In the February 2, 2006 memorandum, Herman F. Moeller, group manager, directed appellant to “immediately cooperate with the examiner” regarding his federal income tax returns for the years 2000 through 2003. He also directed appellant to authorize and sign consent to extend the statute of limitations for all tax years as requested by the examiner.

In reports dated January 9, April 5 and June 13, 2006, Sean Zielinski, a licensed clinical psychologist, diagnosed chronic and severe dysthymic disorder and opined that he was currently totally disabled. In a March 3, 2006 report, he diagnosed chronic dysthymic disorder and job stress situation stress reaction. Dr. Zielinski, in response to appellant’s March 10, 2006 letter requesting him to “amend the progress notes to include my current symptoms” which appellant stated he attributed to his “being subjected to unfair administrative procedures” by the employing establishment, stated he had read and agreed with appellant’s statements in the letter. On October 27, 2006 he diagnosed anxiety, chronic depression, “disillusionment and job-related stress at the IRS [Internal Revenue Service], due to perceived racial discrimination and perceived unfair administrative actions against him.” Dr. Zielinski opined that the incidents identified in the March 11, 2006 letter “caused, aggravated and accelerated” appellant’s current condition.

On March 24, 2006 Dr. Mojtaba R. Molagh, a treating Board-certified psychiatrist, noted appellant attributed his anger and depression to unfair treatment by his prior employer in 1994. He diagnosed adjustment disorder with mixed emotions and noted appellant “is preoccupied with stressful job situation.” In concluding, Dr. Molagh related that appellant was “apparently responding to adverse circumstances on his job, which is felt unfair to him.”

In an April 6, 2006 letter, Dr. Thomas P. Anderson, an employing establishment physician and a Board-certified internist and preventive medicine physician, requested clarification from Dr. Zielinski regarding appellant’s request for leave under the Family and Medical Leave Act. Based on his review of the medical evidence, Dr. Zielinski noted that appellant appeared to be permanently disabled.

In a June 5, 2006 memorandum, Debra W. Thompson, a program manager/territory manager, notified appellant of a proposal to place him on indefinite suspension based on being under investigation for filing a fraudulent tax return for the tax years 2001, 2002 and 2003 and for being under investigation for filing a fraudulent bankruptcy petition.

² The Office assigned this claim number xxxxxx665, but subsequently canceled the claim number and associated all the documents into claim number xxxxxx935. Under claim number xxxxxx935, appellant, on September 26, 2006, filed an occupational disease claim attributing his chronic depression or dysthymic disorder to his employment. He stated that he first became aware of this condition on January 9, 2006 and that on March 6, 2006 he realized that his work had caused or aggravated the condition. Appellant attributed his depression to the failure to be selected for a promotion to the position of anti-money laundering examiner and to retaliation by the employing establishment after filing an Equal Employment Opportunity (EEO) complaint for racial discrimination based on nonselection. On July 7, 2008 the Board issued a decision affirming a July 3, 2007 Office hearing representative’s decision denying appellant’s emotional condition claim. Docket No. 07-2379 (issued July 7, 2008). The Board denied his petition for reconsideration on February 11, 2009.

On August 4, 2006 Gerald W. Reese, Director, western examination, finalized the June 5, 2006 proposal to suspend appellant. He informed appellant he was being suspended indefinitely beginning August 6, 2006 and that a removal action might be initiated prior to the termination of the suspension.

In a June 15, 2006 report, Dr. Molagh noted that appellant continued to suffer from chronic severe depression. Appellant related he had attempted to return to work, but was unable to “handle the stress that all the administrative procedures put me under.”

In a March 24, 2007 arbitration decision, the mediator found the employing establishment’s indefinite suspension of appellant would not promote the efficiency of the service and directed that appellant be reinstated without back pay. He noted the employing establishment’s actions were premature as an investigation by the Criminal Investigation Division was in progress and no final decision had issued by the Criminal Investigation Division. The mediator rejected appellant’s contentions that his suspension was based on reprisal for protected EEO activities or motivated by reprisal for whistleblower activities. He also found the union did not substantially prevail for the allocation of arbitration fee and expenses.

In progress notes dated February 24, 2009, Dr. Zielinski reviewed letters dated May 11 and August 4, 2006 detailing incidents alleged by appellant and opined that they all aggravated, caused and accelerated his preexisting dysthymic disorder and mental health condition. He noted that the incident described in the August 4, 2006 letter concerned appellant’s indefinite suspension from his position with the employing establishment was discussed during multiple therapy sessions. The medical basis provided by the psychologist was that “any of the incidents referenced above would have lowered the self-esteem and increased the anxiety and pessimism of [appellant].”

By decision dated June 11, 2009, the Office denied modification of the denial of his claim.

A May 28, 2009 U.S. Tax Court decision by Judge Mary Ann Cohen found no deficiencies from or overpayments due for the taxable years 2001 and 2002. Judge Cohen also found no penalties were due for the taxable years 2001 and 2002.

In a letter dated July 1, 2009, appellant requested reconsideration. He contended that the Office erred in canceling claim number xxxxxx665 and merging the documents into claim number xxxxxx935 as he alleged a new factor of employment, *i.e.*, his indefinite suspension beginning August 9, 2006. Appellant requested the reinstatement of claim number xxxxxx665 and that it be processed. On July 28, 2009 he contended that he established that the employing established erred when it denied proper compensation for the performance of higher-graded work.

By decision dated December 4, 2009, the Office found that appellant established a compensable factor of employment with respect to the employing establishment’s failure to compensate appellant for higher-graded work. It found no error or abuse by the employer with regard to his indefinite suspension as there was no error or abuse in the February 2, 2006 directives from his supervisors regarding his tax audit and the August 6, 2006 suspension letter. The Office found his indefinite suspension and the February 2, 2006 directives regarding his tax audit were not compensable factors of employment. It further found that the medical evidence

was insufficient to establish a causal relationship to the accepted employment factor or the failure to be compensated for higher-graded work.

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.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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

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.⁵ 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.⁶ 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.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

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

⁴ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁵ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁶ See *William H. Fortner*, 49 ECAB 324 (1998).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

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

⁹ *Id.*

ANALYSIS

Appellant alleged that he sustained an emotional condition causally related to various factors of his federal employment. The Office accepted the employer's failure to properly compensate appellant for higher-graded work as a compensable factor. The Board finds that he has also established a compensable factor of employment with regard to the suspension for an audit investigation for possibly omitting income from gambling on his taxes. Therefore, the case is not in posture for decision, as the medical evidence was not considered by the Office with respect to this factor.

Appellant alleged error as to the indefinite suspension following a tax audit. This relates to administrative or personnel actions. In *Thomas D. McEuen*,¹⁰ the Board held that 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. 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's 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.¹¹

As to the February 2, 2006 directive from Mr. Moeller, appellant has presented no evidence to establish that his employer acted unreasonably in the issuance of this directive. With respect to his suspension of August 6, 2006, the Board finds that the employing establishment committed error in this administrative action. The record establishes that appellant was under a tax audit investigation for possible irregularities in his income tax filings for the tax year 2001, 2002 and 2003. It was on this basis that the employing establishment suspended him beginning August 6, 2006. A March 24, 2007 arbitration decision found the suspension by the employing establishment to be premature as an investigation by the Criminal Investigation Division was in progress and no final decision had issued by the Criminal Investigation Division. The decision by the arbitrator constitutes evidence that the employer erred in prematurely suspending appellant from work. Appellant had not been indicted for tax fraud nor had the case been referred to a U.S. Attorney for criminal prosecution. There was no probable cause that appellant committed tax fraud at the time he was suspended. The Board finds that appellant has established a compensable factor of employment under the Act pertaining to the administrative action of his suspension.

Appellant has established that his suspension was a compensable work factor. The case presents a medical question regarding whether his emotional condition arose from this

¹⁰ *Supra* note 5.

¹¹ *See M.D.*, 59 ECAB 211 (2007); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

compensable work factor. The Office did not analyze or develop the medical evidence with respect to this compensable factor. The case will be remanded to the Office for this purpose.¹²

CONCLUSION

The Board finds this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 4, 2009 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: April 25, 2011
Washington, DC

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

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

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

¹² A.K., 58 ECAB 119 (2006); *Robert Bartlett*, 51 ECAB 664 (2000). To avoid piecemeal adjudication regarding whether the medical evidence is sufficient to establish a causal relationship between the accepted factor of lack of appropriate pay for higher-graded work and appellant's emotional condition, the Board will not render an opinion on this aspect of appellant's case to allow the Office an opportunity to further develop the evidence when developing the evidence for the accepted factor of the indefinite suspension.