

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD SALLESE and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Glynco, GA

*Docket No. 00-2040; Submitted on the Record;
Issued December 10, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On April 20, 1999 appellant, then a retired criminal investigator, filed an occupational disease claim, alleging that incidents of harassment that occurred while in training to become a special agent¹ at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia caused depression, anxiety and schizophrenia. He had stopped work on August 13, 1998 when he left the training center and was hospitalized from August 13 to 24, 1998 in New York. Appellant took disability retirement on February 13, 1999.

In support of his claim, appellant submitted a number of statements alleging that from May to August 1998 he was continuously harassed and humiliated by management and instructors at FLETC. He also stated that he had experienced severe employment-related depression and anxiety in October 1993 when he met with a psychologist through the Employee Assistance Program and that in October 1996 he was treated by a psychologist in California for paranoia and anxiety. Appellant related that in May 1998 he began treatment with a psychologist in Georgia and in June 1998 went to a Brunswick, Georgia hospital suffering from a panic attack. He described incidents at FLETC in which management spied on him when he was sent to the health unit, a July 2, 1998 incident when management asked him to leave a night club and stated that on August 6, 1998 he was forced to take an eye examination, that management would stand over him during computer training, that he was questioned about cheating on a computer test, that an instructor did something to his computer and manipulated the test, resulting in his failure and that his home office was called. Appellant further stated that he became so nervous that he

¹ Appellant regular duty station was with the Internal Revenue Service (IRS) in New York, New York. He was attending training at the FLETC to become a special agent with the criminal investigation division of the IRS.

sought psychological counseling and when the situation got worse, he had to be hospitalized at a psychiatric facility.

Dr. David P. Goodman, a psychiatrist, submitted an October 5, 1998 report in which he diagnosed schizoaffective disorder with generalized anxiety disorder and advised that appellant was unable to function in any capacity due to this severe, disabling disorder. In a report that was received by the Office on June 14, 1999, Dr. Goodman noted that he had treated appellant beginning in September 1998 and described the incidents and events that appellant related as causing his illness. He concluded that appellant's emotional condition was caused or aggravated by employment.

In an August 10, 1998 statement, Ron Spannuth, who taught physical techniques and physical conditioning at FLETC, noted that appellant could not fully participate in the course and that an exception was made for him to pass.

In statements dated August 11, 1998 and May 21, 1999, George J. Santowski, group manager adviser, stated that beginning the week of May 19, 1998 he had been aware of various academic, health and performance issues relating to appellant, noting that he was not able to pass computer training and had difficulty in comprehending and acting upon information supplied to him by others. Mr. Santowski noted that appellant had been diagnosed with ulcers which led him to fall behind in weapons training and arrest techniques and further stated that, after appellant's complaints about the arrest techniques instructor, he was allowed to change classes. He reported that appellant did not take offered assistance regarding computer tutoring and was taken to see the eye doctor because he was observed peering closely at the computer screen. Mr. Santowski added that the eye examination revealed that appellant did not meet the job requirements of his position without correction and that he did not wear glasses. He further reported that, while appellant first failed the tax examination, he passed after remediation. Finally, Mr. Santowski related that on August 10, 1998 he and the class coordinator met with appellant and discussed his failure to pass the computer test and his apparent inability to comprehend and act upon instructions given to him. Appellant was then terminated from training and he was recalled by his division chief in New York.

In statements dated August 13, 1998 and May 24, 1999, Guy M. Petrillo, resident lead instructor at FLETC, advised that he administered all computer examinations. Mr. Petrillo noted that, upon arrival at the training program, appellant did not indicate that he was unfamiliar with certain computer programs but that this became evident. He indicated that appellant did not avail himself of computer tutoring that was offered and subsequently failed his computer examination. Mr. Petrillo also noted that it appeared that appellant could not see the computer screen clearly. He concluded that he expended more efforts on appellant than any other student.

Arlene M. Thompson, chief of basic training, provided a July 1, 1999 statement in which she described the training program including the criteria used to evaluate trainees. Ms. Thompson stated that appellant was terminated from the program because of his failure to pass the computer course, problems he had in qualifying with a firearm, failure to pass the tax examination and failure to meet minimum qualifications for uncorrected vision. She further noted a consistent pattern of behavior on appellant's part in which he continually failed to follow instructions, lacked attention to detail and responsiveness to one-on-one training, and failed to

accept responsibility by stating that he misunderstood instructions, scheduling, etc. Ms. Thompson stated that when appellant underwent health screening prior to participation in the training program, he did not disclose any mental disorders of any kind or indicate, during the course of the program, that he was being treated for any mental disorder. She noted that appellant bypassed the FLETC health unit by going to an outside facility in May and June 1998 and, thus, no record of his medical care was documented. Ms. Thompson further stated that appellant was removed from the program on August 10, 1998.

By decision dated October 27, 1999, the Office denied appellant's claim, finding that he had not sustained an emotional condition in the performance of duty. The Office found that the alleged factors cited were either unsupported by the evidence of record or were proper administrative actions taken by management. On January 26, 2000 appellant requested a hearing. In a March 13, 2000 decision, an Office hearing representative denied the request on the grounds that it was untimely filed. The instant appeal follows.

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

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Workers' compensation law is not applicable to each and every injury or illness that is somehow related to employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.³ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁵ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁶ When an employee experiences emotional stress in carrying out his

² *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Supra* note 4.

⁶ *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

employment duties or has fear and anxiety regarding his ability to carry out his duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁷

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.⁸ This includes matters involving the training or discipline of employees. The Board has held, however, 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.⁹ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of the case to determine whether the employing establishment acted reasonably.¹⁰

Furthermore, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹¹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. The issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹²

In the present case, appellant has not attributed his emotional condition to the performance of his regular duties as a special agent or to any special requirement arising during training or specifically the dismissal therefrom. He, therefore, did not implicate employment duties under *Cutler*. Rather, appellant's claim pertains to allegations of harassment and discrimination by management and his instructors at the FLETC. Appellant, however, provided no supportive documentation to establish his allegations of discrimination or retaliation by employing establishment personnel during the training course. The employing establishment, however, submitted a number of statements indicating that appellant was given numerous opportunities to fulfill the training requirements. There is nothing to indicate that the computer training and test were improperly given, that appellant was improperly required to submit to an eye examination or that he was spied upon in the health unit. The position for which he was

⁷ *Lillian Cutler*, *supra* note 4 at 130.

⁸ *See Gregory N. Waite*, 46 ECAB 662 (1995).

⁹ *See Jose L. Gonzalez-Garced*, 46 ECAB 237 (1994).

¹⁰ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹¹ *See Michael Ewanichak*, 48 ECAB 354 (1997).

¹² *Id.*

training required specific vision levels and the record provides adequate explanation for the instructors' concerns regarding appellant's vision. Likewise, there was no evidence indicating that appellant was harassed the evening of July 2, 1998 at a nightclub. While Mr. Santowski indicated that appellant was allowed to change arrest techniques class, there is nothing to indicate that there was any error or abuse on the part of the employing establishment. The Board therefore finds that in this case appellant's emotional condition must be considered self-generated,¹³ and he therefore failed to establish that he sustained an emotional condition in the performance of duty.¹⁴

The Board further finds that the Office did not abuse its discretion in denying appellant's hearing request.

In the present case, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its March 13, 2000 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since his request had not been made within 30 days of its October 27, 1999 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹⁵ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁶ In the present case, appellant's request for a hearing dated January 26, 2000 was made more than 30 days after the issuance of the Office's prior decision dated October 27, 1999 and, thus, appellant was not entitled to a hearing as a matter of right, which the Office properly stated in its March 13, 2000 decision.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, in its March 13, 2000 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹⁷ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

¹³ *Sandra Davis*, 50 ECAB 450 (1999).

¹⁴ As appellant 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).

¹⁵ 5 U.S.C. §§ 8101-8191.

¹⁶ *Henry Moreno*, 39 ECAB 475 (1988).

¹⁷ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated March 13, 2000 and October 27, 1999 are hereby affirmed.

Dated, Washington, DC
December 10, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member