

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

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**RICHARD O. GAYTAN, Appellant**

**and**

**DEPARTMENT OF LABOR, EMPLOYMENT  
STANDARDS ADMINISTRATION,  
Oakland, CA, Employer**

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**Docket No. 04-1626  
Issued: November 22, 2004**

*Appearances:*  
*Richard O. Gaytan, pro se*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 14, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 15, 2004, denying modification of a December 23, 2003 decision finding that appellant had not establish an employment-related emotional condition. 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 has established that he has an emotional condition causally related to compensable factors of his federal employment.

**FACTUAL HISTORY**

On July 22, 2003 appellant, then a 52-year-old equal opportunity specialist, filed a Form CA-2 (notice of occupational disease and claim for compensation) alleging that he sustained post-traumatic stress disorder (PTSD) as a result of his federal employment. Appellant stated

that his work performance was described by his supervisor as being low in productivity and that appellant was unable to use basic communication skills; he also reported “unnecessary job pressure.”

Appellant further discussed his claim in an August 21, 2003 letter, stating that his condition was aggravated in December 2001 when he witnessed a racial remark from a coworker. According to appellant, on August 1, 2002 he received a mean look from his supervisor, on April 13, 2003 he was denied a promotion based on his performance appraisal and his April 28, 2003 request for a transfer was denied.

The record indicated that appellant filed a grievance with respect to the denial of a promotion. An April 18, 2003 Step 2 decision reported that appellant had alleged that he was not timely promoted, and that he was subject to retaliation and discrimination by supervisor Georgia Martin. The decision denied appellant’s grievance and found no violations of the employment contract.

With respect to an incident involving a racial remark, appellant submitted an affidavit and written responses provided in an EEO investigation of the incident. Appellant indicated that he overheard a remark made by a coworker, Ms. Batiste, to another coworker that the District Director, Mr. Luevano, “is better off making salsa than running this place.” Appellant reported that the statement was made in “a racial-slur tone of voice.” He also stated that there was “systemic discrimination” in the office and it was difficult to work in a hostile environment.

In a September 10, 2003 letter, the employing establishment stated that appellant received a satisfactory overall performance rating, but was not promoted to the next level because he had not demonstrated the necessary level of performance for such a promotion. The employing establishment stated that appellant had not been treated differently from any other employee and had received feedback on a regular basis regarding his work performance.

In a decision dated December 23, 2003, the Office denied appellant’s claim for compensation. The Office found that appellant had not established compensable work factors as contributing to an emotional condition; it was determined that the evidence did not support that a December 2001 incident, or an incident involving a mean look by the supervisor, had occurred.

On February 5, 2004 appellant requested reconsideration of his claim. He cited case law from other administrative agencies and also stated that he had submitted evidence that the racial remark incident had occurred as alleged. In a letter dated April 13, 2004, an employing establishment regional director stated that appellant’s performance evaluation was based on a careful review of the quality and quantity of his work and appellant was not promoted because his work performance did not demonstrate the ability to perform at the next level. The employing establishment also indicated that appellant’s role in reporting the alleged racial remark was voluntary and there were no repercussions.

In a decision dated April 15, 2004, the Office denied modification of the prior decision. The Office accepted that alleged incidents, other than the supervisor looking at appellant in a demeaning way, did occur but did not constitute compensable factors of employment.

## LEGAL PRECEDENT

Appellant 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 factors of his federal employment.<sup>1</sup> To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>2</sup>

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>3</sup>

## ANALYSIS

Appellant has alleged that he overheard a remark made by a coworker to another coworker that a supervisor was "better off making salsa than running this place." The Board notes that the remark was not directed at appellant,<sup>4</sup> nor was the conversation part of appellant's regular or specially assigned duties. While appellant may have perceived the remark to be offensive, not every statement uttered in the workplace will give rise to coverage under the Act.<sup>5</sup> The record does not contain any probative evidence that is sufficient to constitute a compensable work factor with regard to overhearing a remark from a coworker.

The affidavit submitted by appellant in connection with an investigation of the December 2001 incident contains general allegations of discrimination and a hostile work environment, without providing any evidence or detail to support the allegation. With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's

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<sup>1</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>2</sup> *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>3</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> If the evidence establishes a derogatory epithet was directed at a claimant, this may establish a compensable work factor. *See Felix Flecha*, 52 ECAB 268 (2001); *Abe E. Scott*, 45 ECAB 164 (1993).

<sup>5</sup> *See Christophe Jolicoeur*, 49 ECAB 553, 556 (1998).

supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.<sup>6</sup> An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.<sup>7</sup> The grievance decision indicated that appellant raised the allegation of retaliation and discrimination by supervisor, but the grievance was denied and no probative evidence of discrimination or retaliation was submitted. The Board finds no evidence of record to support a claim based on retaliation and discrimination.

The remaining allegations raised by appellant concern administrative or personnel matters: a performance appraisal, denial of a promotion and denial of a transfer. It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.<sup>8</sup> The Board has also found, however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.<sup>9</sup> In this case the employing establishment stated that appellant's performance was carefully reviewed and he was not promoted because his performance did not warrant promotion. The May 9, 2003 letter stated that appellant's transfer request was carefully considered and could further discuss the matter if he had any questions. No evidence was presented to establish error or abuse by the employing establishment. In addition, the allegation that appellant's supervisor gave him a mean look does not provide sufficient detail or evidence to establish that the actions were erroneous or abusive.

The Board notes that appellant cited decisions of other administrative agencies with respect to the issue presented. The issue in this case is whether appellant has identified and substantiated work factors that are compensable factors of employment under the Act that may, with relevant medical evidence, establish an injury in the performance of duty. The findings of an administrative agency with respect to entitlement to benefits under a specific statutory authority have no bearing on entitlement to compensation under the Act.<sup>10</sup> The Board finds that appellant did not submit sufficient evidence to substantiate a compensable work factor in this case. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.<sup>11</sup>

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<sup>6</sup> *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

<sup>7</sup> *Helen P. Allen*, 47 ECAB 141 (1995).

<sup>8</sup> *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

<sup>9</sup> *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>10</sup> *Burney L. Kent*, 6 ECAB 378 (1953) (findings by the Veterans Administration had no bearing on proceedings under the Act); *see also Daniel Deparini*, 44 ECAB 657 (1993) (findings of the Social Security Administration are not determinative of disability under the Act).

<sup>11</sup> *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

**CONCLUSION**

The Board finds that appellant did not submit sufficient evidence to establish a compensable work factor with respect to his claim. Because appellant did not substantiate a compensable work factor, he cannot meet his burden of proof to establish a condition causally related to compensable work factors and the Office properly denied the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 15, 2004 and December 23, 2003 are affirmed.

Issued: November 22, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member