

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

DAN F. BENNETT, Appellant)	
)	
and)	Docket No. 05-60
)	Issued: March 7, 2005
DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, CHERRY POINT, NC)	
Employer)	
)	

<i>Appearances:</i> Dan F. Bennett, pro se Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 11 and August 4, 2004 merit decisions, denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On December 16, 2003 appellant, then a 51-year-old architectural technician, filed an occupational disease claim alleging that he sustained an emotional condition due to various incidents and conditions at work. He indicated that he sustained aggravation of his preexisting

post-traumatic stress disorder, generalized anxiety disorder and panic attacks and indicated that he had “increased symptoms by being placed in a workplace with high visibility and exposure.”

In a statement dated November 26, 2003, appellant indicated that his supervisor, Robert Jones, advised him around October 15, 2003 that he had to move to another office space. Appellant indicated that he had been in his current office space for a year and felt safe there because he could hide at his desk, which was located behind a large column. He stated that he informed Mr. Jones regarding his fears about “being exposed to everyone that walked by” and claimed that anyone “could walk right up to him” if he moved to another office space. Appellant asserted that he feared “reprisal of the 32 employees that were buying drugs on base and the 16 drug dealers that were fired at facilities maintenance department who put a death threat on my life 13 years ago because of my cooperation with naval investigative service.”¹ He claimed that one of the drug dealers tried to run his vehicle over another employee, who cooperated with the investigation.

Appellant asserted that the work area in his new office space had a door opening that was 38 inches wide and indicated that he felt vulnerable because everyone who entered the area walked right past him and could approach him very quickly. He indicated that he moved a filing cabinet such that the door opening that was only about 26 inches wide, but that Mr. Jones told him that he had to move the cabinet. Appellant indicated that he then moved the cabinet and put up a partition that made the opening 25 and a half inches wide, but that Mr. Jones told him that the opening had to be 36 inches due to building code requirements for handicapped employees. He alleged that other door openings at the employing establishment were less than 36 inches wide and asserted that other supervisors did not adequately address his concerns. Appellant claimed that Mr. Jones sent him an email on November 4, 2003 which ordered him to fix the door opening. He noted that Mr. Jones advised him that he was safe but that he continued to worry that he was vulnerable to employees from the maintenance department. Appellant indicated that he was so upset on November 5, 2003 that he had to leave work.

Appellant submitted numerous medical reports and other records concerning his long-standing psychiatric and substance abuse problems. In a report dated January 21, 2004, Dr. Charles D. Godwin, an attending Board-certified psychiatrist, stated that appellant sustained post-traumatic stress disorder, generalized anxiety disorder and panic attacks as a result of events that occurred in his workplace in 1989, including being concerned for his safety after giving testimony about drug activities of coworkers.

In a statement dated December 5, 2003, Mr. Jones stated that appellant had his office space moved two times in the prior seven years due to changes in the operational space available. He indicated that there was no attempt to single out appellant for relocation and that alterations made where possible to conform with building code requirements for handicapped employees. Mr. Jones asserted that many of the employees involved in the drug problems referenced by appellant had been separated from the employing establishment for many years.

¹ Appellant asserted that most of the 32 employees that were buying drugs on base still worked at the employing establishment and that the 16 drug dealers had friends and relatives on base. He claimed that the “looks and names I have been called are terrible.”

By decision dated February 11, 2004, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.

In a letter dated March 6, 2004, appellant requested a review of the written record by an Office hearing representative. Appellant alleged that Mr. Jones singled him out for office relocation and again suggested that he discriminated against him with respect to enforcing the building code. He claimed that Mr. Jones acted unreasonably in preventing him from altering the door opening to his office space. Appellant claimed that Mr. Jones harassed him by threatening to hold up his promotion if he did not alter the door opening.

By decision dated and finalized August 4, 2004, the Office hearing representative affirmed the Office's February 11, 2004 decision.

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 regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² 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 frustration from not being permitted to work in a particular environment or to hold a particular position.³

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 employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

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.⁶ If a claimant does implicate a factor of

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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.⁷

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated February 11, 2004, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors and, by decision dated and finalized August 4, 2004, an Office hearing representative affirmed the Office's February 11, 2004 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that when he was made to move to a new office space he was concerned about "being exposed to everyone that walked by" and asserted that he feared reprisal from 32 employees that were buying drugs on base and 16 drug dealers in the maintenance department who put a death threat on his life 13 years prior because of his cooperation with an investigation into these matters. He asserted that the work area in his new office space had a door opening that was 38 inches wide and indicated that he felt vulnerable because everyone who entered the area walked right past him and could approach him very quickly.

The Board has recognized the compensability of physical threats in certain circumstances, but the factual aspects of such claimed threats must be established in order to show a compensable employment factor.⁸ Appellant has not submitted sufficient factual evidence to show that he was subjected to physical threats in the manner alleged. Appellant made only general statements regarding his claim that employees involved in drug dealing at the employing establishment posed a threat to him. He indicated that there had been a death threat against him 13 years prior, but he did not provide any further description regarding this claimed threat or present any supporting factual evidence regarding it. Appellant asserted that friends and relatives of drug dealers on base made "terrible" comments to him, but he did not describe these comments or present evidence showing that they were actually made.⁹

Appellant also alleged that Mr. Jones committed harassment and discrimination, by singling him out for transfer of his office space and by requiring him to have his door opening conform to building code regulation while other offices were not in conformance with these regulations. He claimed that Mr. Jones threatened to hold up his promotion if he altered his door opening. To the extent that disputes and incidents alleged as constituting harassment and discrimination are established as occurring and arising from appellant's performance of his

⁷ *Id.*

⁸ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

⁹ It should be noted that Mr. Jones indicated that many of the employees involved in the drug problems referenced by appellant had been separated from the employing establishment for many years.

regular duties, these could constitute employment factors.¹⁰ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹¹ In the present case, Mr. Jones denied that appellant was subjected to harassment or discrimination with respect to transfer and building code issues and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against as alleged.¹² Appellant alleged that Mr. Jones made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹³ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Moreover, appellant did not show that he established an employment factor with respect to the administrative aspects of Mr. Jones' management of office space transfers and enforcement of building code regulation. The Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹⁴ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵ Appellant did not present any evidence showing that Mr. Jones committed error or abuse in carrying out the administrative functions of managing office space transfer and enforcing building code regulation. The Board notes that appellant's reaction to the above-described conditions and incidents at work must be considered self-generated in that it essentially resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.¹⁶

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁷

¹⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹² 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). Mr. Jones indicated that there was no attempt to single out appellant for relocation and that alterations were made where possible to conform with building code requirements for handicapped employees.

¹³ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁴ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁵ *Id.*

¹⁶ *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the August 4 and February 11, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member