United States Department of Labor
Employees' Compensation Appeals Board

MARK V. FALKENSTEIN, Appellant	)	
and	)	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, GREAT LAKES REGION, Des Plaines, IL, Employer	)	**Docket No. 05-1202** **Issued: November 4, 2005**

Appearances:
Mark V. Falkenstein, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 4, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated February 22, 2005, denying that he had not established an emotional condition claim. 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 met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

FACTUAL HISTORY

On September 5, 2003 appellant, then a 57-year-old air traffic control specialist, filed an occupational disease claim alleging that on August 27, 2003 he developed severe depression and an anxiety disorder due to a remark made by Bill Casey, his supervisor, on January 6, 2003.

Appellant developed self-doubt regarding his ability to function in a hostile work environment even though his supervisor apologized for the comment. He first attributed his condition to his employment on August 28, 2003.

The Office requested additional factual and medical evidence by letter dated September 25, 2003. Appellant submitted a statement on September 29, 2003 and attributed his emotional condition to an abusive and hostile work environment at the employing establishment. He stated that his peers were told to expect problems from him. Appellant alleged that Mr. Casey informed him and other controllers that the reason supervisor Tom Kollker retired was because "he did not want to have to deal with [appellant]." He believed that this comment "fostered a negative message to my peers and myself that I was going to have problems being a successful air traffic controller." He reported the remark to his union representative, Rick Polete, and a subsequent meeting was held between appellant, Mr. Polete and Mr. Casey. Mr. Casey apologized for the statement and stated that he was "just kidding." Appellant also mentioned a July 17, 2003 statement by Mr. Casey that appellant was paranoid in response to his allegation that he was unfairly blamed for an operational incident.

Appellant submitted a report from Dr. Louis B. Cady, a Board-certified psychiatrist, in support of his claim.

The employing establishment responded on September 29, 2003 and Barry L. Jeffries, a manager, stated that Mr. Casey's remark was one of several comments cast about the room during a teasing session between employees. Mr. Casey sought out and apologized to appellant. Mr. Polete heard Mr. Casey make the remark that Mr. Kollker retired because he did not want to have to "deal with [appellant]" on September 11, 2003. He further noted that this remark was made after a joking comment from an unnamed coworker that he did not want to train appellant. Immediately following this remark, Mr. Casey stated that avoidance of appellant's training was not the real reason that Mr. Kollker retired. The July 2003 comment was not witnessed. Mr. Jeffries asserted that there was no hostile work environment.

Mr. Casey submitted a statement alleging that there was an ongoing joke at the employing establishment attributing Mr. Kollker's retirement to various employees, including him. On the day in question, several employees were attributing Mr. Kollker's absence to each other and Mr. Casey stated that he replied that each employee in the room was responsible as well as appellant. When he learned that appellant became upset by the jocular remark he was incredulous. Mr. Casey sought appellant out in order to apologize and to assure him that he was not responsible and was doing a good job. He described the operational incident on July 17, 2003 and stated that appellant became defensive and indicated that he felt he was being blamed. He confirmed that he stated, "Slow down and don't go getting paranoid on me." Mr. Casey explained the reasons for the questions and believed that appellant relaxed. He noted that he told appellant that he had done the right thing and to keep up the good work.

Appellant submitted a narrative statement on October 27, 2003 describing the circumstances surrounding Mr. Kollker's retirement and Mr. Casey's comment that the retirement was due to avoidance of appellant's training. Appellant described his reaction to this remark. He also submitted several statements in which he disagreed with Mr. Casey's characterization of his remarks as "teasing."

Appellant described the operational incident on July 17, 2003 as a "quality" issue rather than an error. He noted that three of his coworkers discussed his options he implied that he could have provided a better quality of service. Appellant sought out Mr. Casey to provide his version of events; however, he seemed uninterested and accused him of paranoia. Mr. Casey stated that appellant had done all he could and that it was "no big deal." Appellant attributed his emotional condition to Mr. Casey's poor judgment, poor interpersonal skills, insensitivity and general lack of good management skills. He also noted that his training had not met the goal of five hours a week varying between three hours a week and no training for almost three weeks.

By decision dated March 19, 2004, the Office denied appellant's claim finding that he had not substantiated a compensable employment factor.

Appellant requested an oral hearing on April 24, 2004. He testified at the oral hearing on October 27, 2004. Appellant repeated his earlier allegations and alleged that, on August 27, 2003, Mr. Casey stated that he believed that appellant was experiencing memory problems. The employing establishment submitted responses from Mr. Casey, Mr. Jeffries and Ricky Dilbreck.

By decision dated February 22, 2005, the Office hearing representative affirmed the March 19, 2004 decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related 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 worker's compensation. Where the disability results from an employee's emotional reaction to his regular of specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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.[2]

Generally, actions of the employing establishment in administrative or personnel matters unrelated to the employee's regular or specially assigned work duties, do not fall with the coverage of the Act.[3] While an administrative or personnel matter will be considered an employment factor where the evidence discloses error abuse on the part of the employing establishment, mere perceptions are insufficient. In determining whether the employing establishment erred or acted abusively, the Board determines whether the employing establishment acted reasonably.[4] The Board has held that the manner in which a supervisor

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen,* 41 ECAB 387, 390-91 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *James E. Norris*, 52 ECAB 93, 100 (2000).

[4] *Bonnie Goodman*, 50 ECAB 139, 143-44 (1998).

exercises his or her discretion falls outside the coverage of the Act. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[5]

Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. Although the Board has recognized the compensability of verbal abuse in certain circumstances this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[6]

For harassment or discrimination to give rise to a compensable disability, there must be evidence 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.[7]

ANALYSIS

Appellant attributed his emotional condition to two remarks by his supervisor, Mr. Casey. He alleged that on January 6, 2003 Mr. Casey inappropriately stated that appellant's former supervisor, Mr. Kollker, had retired in order to avoid training him. Mr. Casey acknowledged making this remark, but asserted that this was in the context of a running joke at the employing establishment and that similar remarks regarding Mr. Kollker's retirement had been made regarding other employees, including himself. Appellant's witness, Mr. Polete, a union representative, noted that Mr. Casey's comment was made after other jokes and that Mr. Casey immediately assured appellant and others that this was not the real reason Mr. Kollker had retired.

The Board finds that Mr. Casey's remark does not rise to the level of verbal abuse or harassment of appellant. Both Mr. Casey and Mr. Polete stated that this remark was made in a joking or teasing context that Mr. Casey immediately retracted the remark and that he later apologized for any offense to appellant. The Board has held that such isolated remarks do not rise to the level of verbal abuse and that mere perceptions of harassment are not compensable.[8]

Appellant also attributed his condition to Mr. Casey's remark on July 17, 2003 which he interpreted as accusing him of paranoia. Mr. Casey indicated that he felt that appellant was overly concerned with other's perceptions of his actions regarding the operational incident, that appellant should slow down and avoid paranoia and concluded that he had informed appellant that his actions were correct. The Board finds that the evidence of record does not establish verbal abuse by Mr. Casey in using this term. A claimant's own feeling or perception that a statement by a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact,

[5] *Linda J. Edwards-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004).

[6] *Marguerite J. Toland*, 52 ECAB 294 (2001).

[7] *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

[8] *Id.*

erroneous or abusive. There is insufficient evidence to substantiate that Mr. Casey was abusive in his critique of appellant's work. The Board finds that appellant has not established a compensable factor of employment in regard to this incident.

Finally, appellant attributed his emotional condition to a lack of consistent training. Training is considered to be a personnel matter and will not be compensable absent error or abuse.[9] Appellant has alleged that he lacked consistent training as he was only trained three hours or less a week rather than the desired average of five hours a week. This unsubstantiated contention is not sufficient to establish error or abuse on the part of the employing establishment in training appellant and does not constitute a compensable factor of employment.

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.[10]

CONCLUSION

The Board finds that appellant failed to meet his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

[9] *James E. Norris*, 52 ECAB 93, 102 (2000).

[10] 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).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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