

The record indicates that no action was taken on this claim. On December 18, 2003 appellant filed a second Form CA-2 alleging that he sustained an emotional condition in the performance of duty due to an alleged pattern of harassment, discrimination, reprisals and disparate treatment by his supervisors and threats by a coworker.¹ He did not stop work.² The record demonstrates that appellant had intermittent work absences from March 6, 2000 through March 5, 2004 and retired from the employing establishment in April 2004.

In January 25, 2002 and January 12, 2004 Equal Employment Opportunity (EEO) affidavits, February and December 2003 attachments to his claim forms and several letters, appellant described the alleged employment factors which he asserted caused or contributed to his emotional condition. He alleged that, beginning in 1996, the employing establishment denied him access to promotions, vacancy announcements and the job training necessary for him to be promoted. In late 1997, Supervisor Scott Sanner deliberately failed to inform him of a desired job vacancy but told another employee of the position. In May 1998, an administrative policy was changed to provide improved access to job announcements. Appellant alleged that management refused to give him an appropriate seniority rating for a position announced on November 17, 2003.

Appellant also alleged that the employing establishment gave him unfavorable assignments and refused his requests for medical accommodation. In July 1996, after he was diagnosed with depression and hypoglycemia, Port Director John Vigil refused his request for medical accommodations. Appellant fractured a toe in October 1997, and asserted that Mr. Sanner deliberately assigned him to a position requiring prolonged standing. He accused Port Director Bernardo Olivas of ignoring his requests for medical accommodations on May 22, 2000 and in March 2001.³ He alleged that, during a November 20, 2003 performance appraisal, Supervisor Rogelio Lozano stated that appellant would not be given a desired position. Appellant alleged that, on another occasion, Mr. Lozano told Gloria Venezia, appellant's wife, and an employing establishment supervisor, that there was no justification to honor his previous work restrictions.

Appellant alleged a series of threats and confrontations by supervisors and coworkers. In 1996, Mr. Vigil threatened to "nail [his] hide to the wall." In late 1999, Coworker Ron Perez would glare or stare at appellant's wife at work. In an August 26, 2003 telephonic EEO hearing, Mrs. Venezia testified that Mr. Perez had stared at her for prolonged periods of time on various occasions in 1999 and 2000, causing her to feel threatened and intimidated. In a July 18, 2000 letter, Mr. Olivas acknowledged that appellant reported that Mr. Perez had threatened his wife.

¹ The Office assigned the March 28, 1998 claim No. 162068725. The Office filed appellant's December 18, 2003 claim under the same number. In the December 18, 2003 claim form, appellant noted that he had delayed filing his claim as it took time for him to assemble the evidence he wished to submit.

² In February 23, 2004 letters, the Office advised appellant of the additional medical and factual evidence needed to establish his claim, including a detailed statement of the work factors alleged and a treatment history. The Office also requested information from the employing establishment regarding appellant's allegations.

³ The record contains appellant's March 19, 2000 letter requesting medical accommodations for depression and hypoglycemia.

He therefore reported the threat to a regional director and reassigned appellant to a different facility to reduce or eliminate contact with Mr. Perez.

On February 3, 2000 Mr. Perez became enraged, shouted in his face that he was paranoid and delusional, accused him of abusing sick leave and of being a “white racist” for protecting other whites as a union representative. Appellant claimed that Mr. Perez followed him into a station booth, continuing his tirade. He asserted that Coworkers Chad Gerber and Tom Urie observed that Mr. Perez was highly agitated after the alleged incident. In February 2002, Mr. Perez called appellant “handicapped” in front of other employees. He contended that Mr. Perez told Supervisor Zaheena Saleem that he would kill appellant with his bare hands. Appellant reported the incident to Supervisor Jesse Underwood and Mr. Olivas, but alleged that the employing establishment did not abide by its workplace nonviolence policy and wrongly disclosed confidential information. In September 2000, Mr. Perez told a coworker that he wanted to get rid of appellant. Appellant also alleged that, in June 2000, he was threatened physically and verbally by Supervisors Ernie Serna and Ms. Saleem.

Appellant also alleged a pattern of harassment by Supervisor Constance Taft. He asserted that, on unspecified dates, Ms. Taft falsely accused him of “slacking,” tried to ruin his chances for promotion and told Ms. Saleem to stay away from him as he was “no good,” “postal” and had filed EEO complaints against the former port director. She also allegedly invited Ms. Saleem to help her “get” appellant. In August or September 1999, Ms. Taft and another supervisor falsely accused him of threatening them with a knife he was using to cut up imported fruit in an inspection lab. He asserted that he was not allowed to defend himself against Ms. Taft’s false allegations of workplace violence. Appellant accused Ms. Taft of trying to get him fired, bypassing the chain of command to make false statements about him and perjuring herself regarding the incident at an administrative hearing. Appellant also asserted a “performance incident” regarding Ms. Taft occurring in December 1999 or early 2000, in that Ms. Taft colluded with coworkers, including Mr. Perez, to control the port and further their careers. He alleged that, as of March 2000, Ms. Taft had created a hostile work environment causing mental and physical symptoms and damaging his reputation.

Appellant also alleged a pattern of harassment, retaliation, mismanagement and malfeasance by Mr. Olivas. He asserted that Mr. Olivas asked him on two occasions if he was seeking a medical retirement, did nothing to stop harassment by Ms. Taft, conspired to protect Mr. Perez after he had threatened appellant and conspired with supervisor Jesse Underwood to cover up or ignore threats and discrimination against appellant and tried to get him fired. He alleged that these actions were in retaliation for filing EEO grievances and a January 2001 complaint to the employing establishment’s Office of the Inspector General.⁴ Appellant alleged that Mr. Olivas admitted that he improperly revealed private EEO information to Ms. Taft. He accused Mr. Olivas of dereliction of duty, participating in a conspiracy against employee Mr. Urie, allowing other supervisors to aid, abet or conceal criminal activity, including a technician impersonating a federal border patrol officer, ignoring multiple complaints by officers

⁴ The record indicates that, on January 1, 2001, appellant filed a complaint with the employing establishment’s Office of the Inspector General, accusing Mr. Olivas of dereliction of duty, ignoring or protecting criminal conduct, fraud, cronyism and general misconduct.

Ernie Serna and Mr. Lozano, using improper weapons and ammunition at a qualifying range, credit card and compensation fraud and concealing threats against appellant.

Appellant also alleged that Mr. Olivas unreasonably delayed implementation of an October 17, 2003 EEO voluntary settlement agreement which specified that there was no determination, implication or “admission of liability, fault or error” by the employing establishment.⁵ The employing establishment agreed to reassign appellant to a position within his medical restrictions, including no contact with personnel he perceived as hostile, no frequent travel and no exposure to extreme weather. Appellant alleged that Mr. Olivas tried to assign him to the same duty station as Mr. Perez in contravention of the agreement. He stated that he disliked positions to which Mr. Olivas assigned him.

In a June 12, 2001 letter, Mr. Olivas explained that appellant’s job reassignment was formulated using the medical opinions of his attending physicians. Mr. Olivas stated that the reassignment process required disclosures of appellant’s medical information to a union official and medical officer but that confidentiality was otherwise maintained. On September 10, 2001 Mr. Olivas reassigned appellant to the El Paso International Airport in order to separate him from personnel he perceived as hostile, including Mr. Perez. In accordance with his medical restrictions, the position did not require extensive travel or exposure to extreme weather conditions which would interfere with his medications. On December 24, 2003 appellant accepted a medical accommodation job assignment in accordance with his medical restrictions. Mr. Olivas assigned appellant to a similar position as of February 27, 2004.

Appellant alleged that he received unfair performance assessments. He asserted that in 1997, Mr. Sanner criticized minor details of his job performance in a demeaning way. Appellant alleged that, in 1997, supervisor Aaron Miller harassed him during a performance evaluation, telling him to increase his disease and insect “reportables” quota or he would be terminated. He asserted that the incident was later turned into a disciplinary matter. In late 1997 or early 1998, Officer Gary Woodard yelled at him to turn himself in for being late and accused appellant of pretending to be ill. Appellant also alleged that, after he was absent from work due to the flu in 1998, a supervisor instructed an officer to spy on appellant to make sure he was arriving at work on time.

By decision dated July 22, 2004, the Office denied appellant’s claim on the grounds that he did not establish any compensable factors of employment. The Office found that the following allegations were not established as factual: appellant was not allowed to defend himself against false allegations by Ms. Taft; collusion by Ms. Taft, Mr. Perez and other employees to control the port and further their careers; in 1997, Mr. Sanner criticized appellant’s performance and tried to prevent appellant from learning of a desired position; Mr. Miller warned appellant in 1997 to increase his quota of insect and disease reportables or be fired; Mr. Perez stared at appellant’s wife for prolonged periods in 1999; Ms. Saleem told appellant that Mr. Perez spoke of him on several occasions and that he hated appellant for filing an EEO complaint against his friend, Mr. Vigil; Mr. Olivas twice asked appellant if he was trying for a

⁵ A March 8, 2002 EEO investigative report regarding appellant’s allegations did not contain a statement of findings.

medical retirement. The Office further found that appellant had not established the following allegations of harassment, discrimination and retaliation as factual: a hostile work environment due to disability; management improperly disclosed confidential medical information; management retaliated against appellant for filing complaints; February 3, 2000 outburst by Mr. Perez; threats against appellant by Mr. Perez made to Ms. Saleem; Mr. Miller instructed Officer Lott to spy on appellant to see if he got to work on time; management ignored his medical problems; management denied him access to desired positions, position announcements; training and promotions; Ms. Taft told another supervisor to avoid appellant as he was “no good,” “postal” and had filed EEO complaints.

The Office found that appellant had not established as factual the following allegations of corruption or fraud in the workplace: Ms. Taft lied about appellant in an administrative hearing; a management conspiracy against Officer Urie; management ignored complaints by officers Serna and Lozano; compensation fraud; credit card fraud; concealment of criminal acts and threats against employees. The Office therefore found that appellant’s reaction to these alleged work factors was not in the performance of duty.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.⁶ Where disability results from an employee’s reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁷ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁸ 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.⁹

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.¹⁰ If a claimant implicates 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.¹¹

⁶ 5 U.S.C. § 8102(a).

⁷ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ *Effie O. Morris*, 44 ECAB 470 (1993).

¹⁰ *See Normal L. Blank*, 43 ECAB 384 (1992); *see Barbara Bush*, 38 ECAB 710 (1987).

¹¹ *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to an alleged pattern of harassment, discrimination and retaliation by his supervisors, threats by coworkers and supervisors, his reaction to perceived fraud and corruption in the workplace, dissatisfaction with his job assignments, and frustration at a perceived lack of promotion and job opportunities. The Office found in its July 22, 2004 decision that appellant failed to establish any compensable factor of employment.

Appellant alleged that, beginning in 1996, the employing establishment denied him access to promotions, vacancy announcements and job training necessary for a promotion. The denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve an employee's ability to perform his regular or specially assigned work duties, but rather constitute the desire to work in a different position.¹² Appellant asserted that, in May 1998, the employing establishment changed its administrative policy to provide improved access to job announcements. However, that the policy was changed does not, in and of itself, establish administrative error or abuse.¹³ The evidence of record does not substantiate appellant's allegations.

Appellant also attributed his condition, in part, to alleged threats and verbal altercations with supervisors and coworkers. He alleged that in 1996, Mr. Vigil threatened to "nail [his] hide to the wall," that coworker Mr. Perez yelled in his face several times on February 3, 2000, that in June 2000, he was threatened physically and verbally by Mr. Serna and Ms. Saleem. He also alleged that Mr. Perez told other employees he wanted to kill appellant in September 2000 and called him "handicapped" in February 2002. However, appellant did not submit evidence corroborating any of these alleged threats. Therefore, he has not established any of the alleged threatening statements as compensable.

Appellant also alleged that, in late 1999, Mr. Perez would glare or stare at appellant's wife at work. Mrs. Venezia confirmed this account of events in an August 26, 2003 testimony in a telephonic EEO hearing. However, this allegation does not concern appellant. It relates to his wife's interactions with Mr. Perez. Therefore, it is not relevant to appellant's claim such as to constitute a compensable factor of employment.

Appellant alleged that the employing establishment did not abide by its workplace nonviolence policy in processing his complaint against Mr. Perez. The Board finds that this allegation relates to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹⁴ However, the Board has also found that an administrative or personnel matter will be considered to be an

¹² *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

¹³ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁴ *Lori Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004); see *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵ The Board notes that Mr. Olivas reported the alleged threats to his superiors and transferred appellant away from Mr. Perez's workstation. The Board finds that, under the circumstances of the case, Mr. Olivas appeared to have acted reasonably. Appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to its handling of his complaint against Mr. Perez.

Appellant also alleged a pattern of harassment, hostility, false allegations, discrimination and retaliation by Ms. Taft from August 1999 through March 2000. He accused Ms. Taft of fabricating disciplinary charges against him in September 1999, perjuring herself in an administrative hearing on those charges and trying to draw other supervisors into a conspiracy to "get" him. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹⁶ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.¹⁷ Appellant has not established harassment, discrimination or retaliation by Ms. Taft as compensable factors of employment as he did not submit sufficient evidence to establish his allegations as factual.¹⁸

Appellant also alleged a pattern of harassment, discrimination and retaliation by Mr. Olivas, including that personal information was improperly disclosed. Appellant also alleged that Mr. Olivas unreasonably delayed implementation of an October 17, 2003 EEO voluntary settlement agreement and tried to assign him the same duty station as Mr. Perez in contravention of the agreement. However, appellant did not submit evidence, such as witness statements or copies of relevant administrative documents, substantiating these allegations as factual. Thus, he has not established a compensable factor of employment in this regard.¹⁹ Appellant did not submit evidence establishing that Mr. Olivas committed mismanagement, fraud, malfeasance or participated in criminal conspiracies as alleged. Thus, he has not established a compensable factor of employment in this regard.²⁰

Appellant also stated that he disliked the positions to which Mr. Olivas assigned him in June and September 2001, December 2003 and February 2004 to accommodate his medical

¹⁵ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹⁶ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

¹⁷ *Linda J. Edwards-Delgado*, 55 ECAB ____ (Docket No. 03-823, issued March 25, 2004).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

restrictions. However, the Board has held that an employee's dislike of his job duties or desire for a different position is not a compensable factor of employment.²¹

Appellant also alleged that the employing establishment refused his requests for medical accommodations in July 1996, May 2000, March 2001 and November 2003. However, the record indicates that the employing establishment abided by appellant's medical restrictions in formulating his job assignments, including consulting a medical officer and union representative. Appellant has not submitted evidence substantiating that the employing establishment did not comply with his work restrictions at any time. Therefore, he has not established a compensable factor of employment in this regard.²²

Appellant also attributed his condition to alleged wrongful disclosures of his personal information. In a June 12, 2001 letter, Mr. Olivas stated that the medical reassignment process required disclosures of appellant's medical information to a union official and an employing establishment medical officer but that confidentiality was otherwise maintained. While Mr. Olivas' letter supports appellant's contention that there was a disclosure of personal information, there is no evidence that such disclosure was error on the part of management in securing appellant's job assignments. He did not establish any administrative error or abuse. Therefore, appellant has not established a compensable factor of employment in this regard.²³

Appellant also alleged that he received unfair performance assessments and unjust criticisms in 1997 and 1998 from Mr. Miller and Mr. Sanner, including that a 1997 appraisal was turned into a disciplinary matter and that an officer was instructed to spy on him to see when he arrived at work. Again, appellant did not submit factual evidence, such as witness statements or copies of his performance appraisals, establishing these incidents occurred as alleged. His vague or unsubstantiated allegations do not constitute compensable factors of employment.²⁴ The Board notes that in the absence of administrative error or abuse, which has not been demonstrated in this case, performance appraisals are not considered to be within the performance of duty.²⁵

For the foregoing reasons, the Board finds that appellant did not establish any compensable employment factors under the Act. Therefore, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty. As appellant failed to establish a compensable factor of employment, it is not necessary to address the medical evidence in this case.²⁶

²¹ *Lillian Cutler*, *supra* note 7.

²² *Linda J. Edwards-Delgado*, *supra* note 17.

²³ *Id.*

²⁴ *See Ruthie M. Evans*, *supra* note 8.

²⁵ *Roger W. Robinson*, 54 ECAB ____ (Docket No. 03-348, issued September 30, 2003).

²⁶ *Garry M. Carlo*, 47 ECAB 299 (1996); *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

CONCLUSION

The Board finds that appellant did not establish that he sustained an emotional condition in the performance of duty as he failed to establish any compensable factors of employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2004 is affirmed.

Issued: April 13, 2005
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member