

On August 14, 2002 appellant, then a 68-year-old attorney adviser, filed a claim alleging that his gastritis plus abdominal pain associated with intestinal spasms was a result of his federal employment: “My employer subjected me to a hostile work environment. My physician drew the conclusion my illness resulted from the hostile work environment.” He stated that his condition began on June 24, 2002 but that his supervisor had singled him out for more than a

year. Appellant charged his supervisor with arbitrarily imposing artificial production standards, which were unwritten, in violation of agency policy and designed to harass. He alleged that his supervisor had contrived a number of other means of increasing the stress in the hostile work environment, which he enumerated. Appellant alleged that he was made to notify his supervisor whenever he planned to leave work before the end of his regular workday and to use leave to cover his absence. He indicated that, if he did not leave work a few minutes early, he would have to rush to catch the ferry or not be home in time for dinner. Appellant charged his supervisor with assigning him disproportionately more, long, complex, time-consuming research cases than any other attorney or paralegal in his group and with directly or indirectly threatening to put him on a performance assistance program. He stated that his supervisor had intentionally denied him the services of a trained typist for his dictation, which wasted his time and lowered his production because he had to spend an inordinate amount of time correcting her errors: "It is really retaliatory harassment for my EEO [Equal Employment Opportunity] complaint, which adds to my highly stressful situation." Appellant described the immediate cause of his condition:

"The immediate cause of my June 24, 2002 illness was [William M.] Weir [appellant's supervisory attorney's] retaliatory act of 'setting me up for failure' by stockpiling my dictated cases in the typing room for over a month; having three typists type the decision over several workdays and on overtime in late May; and then ordering me not to write decisions, but do only clerical correction of typographical, grammatical, and punctuation errors. This reduced my production and understated my work efforts, since I am not credited for doing clerical work by the Regional Office. Mr. Weir was so bent on controlling my production that he marched into my office, the last office workday in May at 4:30 p.m., and ordered me to stop writing a case that was nearly finished, because I was technically completing it on a few minutes of my time. It is clear that Mr. Weir's pattern of harassment was planned to set me up for failure under some artificial, unwritten, numerical standard in reprisal for my EEO complaints. The result was that I was forced to overwork at such a stressful, intense level over a prolonged period of over a month that I became quite ill, and had to take almost three weeks leave in July 2002."

Appellant submitted medical opinion evidence indicating a direct correlation between his gastritis condition and stress induced at work.

Mr. Weir denied appellant's accusations. He stated that neither he nor any member of management threatened appellant, that his job standards fit within the position description of a GS-12 attorney-adviser and that management had afforded him ordinary professional respect. He acknowledged asking appellant to correct cases that could be finalized and released during the current production month, rather than begin work on a new case that could not: "It appears that these discussions about work priorities may have upset [appellant]. I encourage all attorneys to finalize and release cases by the end of each production month." Mr. Weir stated that he did not classify any aspect of appellant's job as stressful: appellant had no production quotas, his deadlines were commensurate with those of other attorneys in the office and no extra workload demands were made during the period in question. He stated: "Although there have been chronic staffing shortages that have slowed the transcription of [appellant's] work, I have taken these shortages into account in assessing the quality and timeliness of his work." Mr. Weir

reported that he had regularly rated appellant as fully successful under a pass-fail evaluation system, and that, although the quality of his work and work priorities had been matters of discussion, he was able to perform the essential elements of his position.

In a decision dated April 30, 2003, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish that he sustained an injury.

On May 16, 2003 appellant requested an oral hearing before an Office hearing representative. He argued that the Office's decision "improperly ignored the fact [that] my disability arose as a result of my supervisor's actions which aggravated a physical condition of mine." At the hearing, which was held on February 9, 2004, appellant testified and submitted evidence, including a brief, examples of decisions with typing errors, memoranda of understanding and the statement of a coworker, who heard a manager state that appellant would be forced to retire real soon because he would not be able to adapt to computers.

In a decision dated May 10, 2004, the Office hearing representative affirmed the denial of appellant's claim on the grounds that he failed to establish a compensable factor of employment.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹ Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.² An employee's emotional reaction to an administrative or personnel matter is generally not covered by workers' compensation. Nonetheless, the Board has held that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in an administrative or personnel matter, may afford coverage.³ As a rule, however, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁴ 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.⁵

¹ 5 U.S.C. § 8102(a).

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Margreate Lublin*, 44 ECAB 945 (1993). *See generally Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁴ *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).

⁵ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

The Board has underscored that, in claims for disability attributed to work-related stress, the claimant must submit factual evidence in support of his or her allegations of stress from “harassment” or a difficult working relationship. The claimant for compensation must specifically delineate those factors or incidents to which the emotional condition is attributed and submit supporting factual evidence verifying that the implicated work situations or incidents occurred as alleged. Vague or general allegations of perceived “harassment,” abuse or difficulty arising in the employment is insufficient to give rise to compensability under the Act. Based on the evidence submitted by the claimant and the employing establishment, the Office is then required to make factual findings which are reviewable by the Board. The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.⁶

ANALYSIS

Appellant filed a claim for workers’ compensation on the grounds that his employer subjected him to a hostile work environment. More specifically, he charged his supervisor, Mr. Weir, with retaliatory harassment for an EEO complaint, a pattern of harassment that was planned to set him up for failure under some artificial, unwritten, numerical standard in reprisal for his EEO complaints. As he stated when he requested an oral hearing before an Office hearing representative, “my disability arose as a result of my supervisor’s actions which aggravated a physical condition of mine.” In support of his claim, he submitted a memorandum he wrote to his supervisor regarding “Harassment in Retaliation of my EEO Complaints.”

As a general rule, supervisory or managerial actions fall outside the scope of workers’ compensation. They are not compensable factors of employment under the Act. In order to establish an exception to this general rule, a claimant must submit probative independent evidence⁷ of error or abuse or unreasonable conduct in an administrative or personnel matter. This is where appellant’s claim fails. Although he well set forth his charges of retaliation and harassment by his supervisor, whether it be arbitrarily imposing artificial production standards or the disproportionately assigning him more, long, complex, time-consuming research cases or any of the other alleged contrivances designed to increase his stress, appellant submitted no evidence proving error or abuse in any administrative matter. He indicated that he filed at least one EEO complaint, but he submitted for the Office’s consideration no favorable final decision or finding that would support any of the charges he makes. With no probative evidence to corroborate something more than perceived impropriety by the supervisor in requiring, for example, that appellant use leave to cover his absence from work, even if this did break with custom and practice, appellant’s case is simply one of subjective allegations, allegations that the supervisor has denied. This is no basis for the payment of compensation benefits. Entitlement to benefits is a matter of evidence. Appellant has not met his burden of proof for want of probative evidence substantiating that administrative error or abuse occurred as alleged. He failed to establish a factual basis for his claim.

⁶ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

⁷ *Sherry L. McFall*, 51 ECAB 436, 440 (2000); *George A. Ross*, 43 ECAB 346, 352 (1991).

In his February 9, 2004 brief to the Office hearing representative, appellant argued, citing Board precedent, that should the employing establishment's administrative actions be considered nonwork factors, the adjudicator must find that the stress and overwork of writing complex custom made decisions, correcting the typist's errors and meeting arbitrary and unfair production standards were compensable factors causing or contributing to the aggravation of his disabling gastrointestinal condition. He indicated that these factors triggered his "fear of inability to fulfill his duties, as altered."

This represents a change in the nature of appellant's claim for compensation. Until this point, he attributed his medical condition to the actions of his supervisor. Now he was implicating, quite independent of his supervisor, fear and anxiety regarding his ability to carry out his assigned duties. A claimant may pursue his claim with zeal, but the nature of the claim must be genuine and the claimant must avoid abuse of process. To this end, as with any original claim for compensation, the claimant has the burden to resolve any unexplained inconsistencies.⁸ Here, it appears that it was after he reviewed case precedent on what was and was not a compensable factor of employment that appellant implicated a factor generally recognized as compensable. This casts doubt on the validity of the claim because it appears self-serving and raises a question of whether he sought to tailor facts to fit the law. Appellant did not explain the lateness of his argument or how the argument was factually consistent with his August 14, 2002 claim form, the accompanying narrative and his May 16, 2003 request for an oral hearing, wherein he bluntly argued that the Office's decision "improperly ignored the fact [that] my disability arose as a result of my supervisor's actions which aggravated a physical condition of mine." With respect to this late argument, therefore, the Board finds that appellant did not meet his burden to establish a *prima facie* case.

CONCLUSION

Appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty. His claim lies outside the scope of the Act as a general rule, and he has submitted no probative evidence to establish that his claim should be considered under the recognized exception to that rule. Further, apparent inconsistencies cast doubt on the validity of appellant's expanded or amended claim.

⁸ The employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); see *George W. Glavis*, 5 ECAB 363 (1953).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member