

representative, which denied his emotional condition claim on the grounds that he failed to prove the factors alleged as causing his conditions.² The Board noted that the Office had at least two opportunities for the employing establishment to comment on appellant's allegations. On remand the Office was instructed to offer the employing establishment another opportunity and if there was no response to accept appellant's allegations as factual. The law and the facts of the case as set forth in the Board's order remanding case are hereby incorporated by reference.

Subsequent to the Board's remand, the employing establishment submitted a letter dated April 25, 2003, responding to appellant's statements as requested by the Office. Dr. Sanford M. Garfunkel, Medical Center Director, noted that contrary to appellant's allegation he was able to take leave and provided him sick, family care and annual leave use for the years 1995 to 2002, which also included authorized absences and restored leave. As to the allegations regarding denied leave, Dr. Garfunkel noted that appellant was denied "annual leave from November 25 to 27, [2002] and for December 30 to 31, [2002]" as appellant had previously "been granted 11 days of annual leave in November [2002] and the other radiation oncologist" had requested leave for the same days. With regard to appellant's on-call status, Dr. Garfunkel noted that, while appellant "was required to be in on-call status for an extended period of time," it was "very rare for a radiation oncologist to be called in after hours" since he would only be called in for situations which were "acutely life-threatening or threatening a permanent change in function" He noted that once a second physician was hired in late 2001, appellant's on-call status was reduced by 50 percent. With regards to being called in the middle of the night to provide therapy in April 2001, Dr. Garfunkel stated that physicians on call, including the Chief of Staff, "are expected to respond to emergencies when they are on call." As to the delay in issuing appellant's performance appraisal, Dr. Garfunkel stated that this occurred due to "problems in Radiation Oncology" and the Chief of Staff "wanted to give [appellant] the opportunity to resolve them." He noted that appellant had been counseled by the prior Chief of Staff "regarding administrative issues, such as time and attendance irregularities." As to appellant's allegations regarding staffing and equipment, he noted that the department was small and any vacancy "can have a large impact." Dr. Garfunkel noted that these problems had been addressed when a supervisory social worker had been detailed to the radiation department and given "supervisory authority to address administrative, personnel and technical issues and scheduling as well as quality assurance." Appellant retained "responsibility for clinical expertise." With regards to allegations that he was improperly denied a promotion, Dr. Garfunkel stated that appellant was not chosen for the position of Chief of Radiology due to "his proficiency rating review on

² On January 31, 2001 appellant, who was then a 54-year-old physician, filed an occupational disease claim for an adjustment disorder and aggravation of asthma and hypertension due to factors of his federal employment. In an April 23, 2001 letter, he attributed his emotional condition to not being allowed to take any vacations for the past three years, being on call every night for the past three and one-half years, being responsible for both patient care and administrative duties since 1997, he had not been given advance notice of the merger of radiation therapy and imaging services, he was threatened with demotion on July 17, 2000 if he did not work with either Dr. Barth or Dr. Krasnow, he was not named permanent chief of the radiation oncology unit, he has no chance of advancement, on December 19, 2000 Dr. Fletcher "was vindictive and verbally abusive" towards him, on December 21, 2000 he was notified that he "subject of a National Practitioner Data Bank Peer Review Panel" based on a tort claim filed by a patient in 1997 and settled in 2000, as he was the only physician he has to be available 24 hours a day, his department is understaffed, he has to work with old equipment and he has no back up coverage and he has to be on call constantly. With regards to the denial of a promotion, appellant contends he is better qualified than Dr. Barth, the current chief. He also alleged that he was subjected to a hostile work environment.

July 17, 2002.” He was not “promoted to permanent chief of radiation therapy because of insufficient record keeping, lack of follow through in obtaining resources, insufficient initiative in completing projects,” “continued complaints from physicians in the hospital” and his “poor communication skills.” Next, as to the national practitioner data bank, Dr. Garfunkel indicated a tort claim had been filed by a patient “after a complication (rectal bleeding) arose after radiation therapy for prostate cancer” which was given by appellant. The patient alleged that appellant had not discussed this possible complication. As a tort claim had been filed, the employing establishment was required to follow the procedure set forth by regulations. Appellant was defended by the Chief of Staff and his name was not reported to the National Practitioner Data Bank. Next, Dr. Garfunkel denied his allegations of verbal abuse. With regards to job-related stress, he noted that there are inherent stressors for physicians.

By decision dated June 30, 2003, the Office denied appellant’s claim on the grounds that he failed to establish that he sustained an injury in the performance of duty. The Office found that he failed to establish any compensable factors.³

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁴

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced 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 Federal Employees’ Compensation Act.⁵ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his allegations with probative and reliable evidence.⁶ Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁷

³ The Board notes that, subsequent to the Office’s June 30, 2003 decision and subsequent to his filing his appeal with the Board, appellant submitted additional medical evidence to the Office and requested reconsideration by the Office. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

⁴ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *James E. Norris*, 52 ECAB 93 (2000).

⁷ *Id.*

ANALYSIS

Most of appellant's allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act.⁸ However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such actions will be considered a compensable employment factor.⁹

The incidents and allegations made by appellant, which fall into this category of administrative or personnel actions include: the denial of a promotion, being denied leave, having to work with antiquated equipment, being subjected to a peer panel review in 2001, based upon a 1997 tort claim which was settled in 2000, being threatened with demotion on July 17, 2000 if he did not work with either Dr. Barth or Dr. Krasnow, not being named permanent chief of the radiation oncology unit and having no chance of advancement. The employing establishment denied appellant's allegations and submitted evidence showing that he was able to take leave. He has presented no evidence of administrative or supervisory error or abuse in the conduct or performance of these actions and, therefore, they are not compensable under the Act.

Appellant also attributes his emotional condition to being responsible for both administrative and patient care duties, being required to be on call constantly and having no backup. The Board has held that overwork may be a compensable factor of employment.¹⁰ In response to appellant's allegations, the employing establishment noted a supervisory social worker had been assigned to the radiation department to deal with the administrative duties of this department while he continued to be responsible for the patient care duties. With regards to his allegations of being on call constantly, the employing establishment agreed that appellant had been "required to be in on-call status for an extended period of time," but it was "very rare for a radiation oncologist to be called in after hours" since appellant would only be called in for situations which were threatening a permanent change in function or were acutely life-threatening. As to his having no backup, the record shows that a second physician was hired in 2001, which resulted in his on-call status being reduced by 50 percent. While the employing establishment supports appellant's allegation that he was constantly on call for a period of time when there was no back up physician, he has not provided any evidence to show that he was called in to provide medical care more than the one time in April 2001, which was noted by the employing establishment. The employing establishment stated that it was very rare for a radiation oncologist to be called in to provide treatment and he has not submitted any evidence disputing this. The employing establishment concedes appellant's allegation that he was the sole physician responsible for being on call for "an extended period of time" and that he was called in one time in April 2001. However, appellant did not submit evidence, such as a witness statement or personnel document,

⁸ *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ *Mary J. Summers*, 55 ECAB ____ (Docket No. 04-704, issued September 29, 2004); *Ruthie M. Evans*, *supra* note 8.

¹⁰ See *Robert Bartlett*, 51 ECAB 664 (2000); *Sandra F. Powell*, 45 ECAB 877 (1994); *Frank A. McDowell*, 44 ECAB 522 (1993); *William P. George*, 43 ECAB 1159 (1992).

to corroborate his allegation that he was called in to provide medical treatment during the time period in question on a frequent basis. The record establishes that he was called in once, during April 2001, when he was on call. Therefore, the Board finds that he failed to establish overwork as a compensable factor of employment.

Appellant also alleges that Dr. Fletcher, his supervisor, was verbally abusive and vindictive towards him on December 19, 2000. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances.¹¹ The Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.¹² However, appellant has submitted no evidence, such as witness statements, supporting that this incident occurred as alleged. The Board finds that appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

CONCLUSION

Appellant has not established that he sustained a disabling emotional condition, causally related to compensable factors of his employment. Therefore, he has not met his burden of proof to establish his claim and the medical evidence need not be addressed.¹³

¹¹ *Cyndia R. Harrill*, 55 ECAB ____ (Docket No. 04-399, issued May 7, 2004).

¹² *Judith A. Tobias*, Docket No. 98-1724 (issued April 14, 2000). *See also Karen K. Levene*, 54 ECAB ____ (Docket No. 02-25, issued July 2, 2003).

¹³ *See Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2003 is affirmed.

Issued: May 3, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member