United States Department of Labor
Employees' Compensation Appeals Board

E.J., Appellant	)	
and	)	**Docket No. 06-499**
	)	**Issued: March 6, 2007**
DEPARTMENT OF AGRICULTURE, OFFICE OF BUDGET & PROGRAM ANALYSIS, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 30, 2005 appellant filed a timely appeal from a November 21, 2005 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of his 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 met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 13, 2004 appellant, then a 46-year-old former program analyst, filed an occupational disease claim alleging that he experienced an adjustment disorder, anxiety and depression on or before April 7, 2003 due to factors of his federal employment. He resigned from the employing establishment on March 15, 2004.

In a statement accompanying his claim, appellant noted that he had filed an Equal Employment Opportunity (EEO) complaint on September 22, 2002. After filing the complaint, management began to harass him daily and he was placed on a personnel performance improvement plan (PIP) in April 2003. Appellant received a satisfactory evaluation in October 2002 and was not given any notice or warning that his performance was unacceptable. He alleged that his supervisor sent him hostile electronic mailings, verbally abused him by demanding that he be perfect, and utilized the PIP meetings to reprimand him. Appellant alleged that management used his unsatisfactory performance to deny him step and within grade increases. He filed an appeal with the Merit Systems Protection Board (MSPB) and was told that, if he lost, he would have to resign. Appellant noted that he was given two months administrative leave to find employment.

By letter dated July 21, 2004, the Office requested additional factual and medical information. In response, appellant stated that his supervisor, Ms. Geraldine Broadway, constantly criticized him at work and treated him unprofessionally. He was harassed and retaliated against for filing the EEO complaint. Appellant also contended that he was placed on the PIP as a form of retaliation and that his supervisors created a hostile work environment. He alleged that he had a greater workload than his coworkers, that his supervisors expected him to maintain accurate and error free work, he was not allowed to ask anyone for assistance without being reprimanded, and had received hostile electronic mailings from his first and second line supervisors.

In an August 17, 2004 report, Dr. Tracy Benford Price, a psychiatrist, diagnosed chronic adjustment disorder with mixed anxiety and depressed mood. He attributed the condition to appellant's work stressors and by the stress associated with the legal proceedings against his employer. In a September 24, 2004 medical report, Dr. Price stated that the specific incidents which contributed to appellant's condition were: harassing and hostile emails, which often referred to appellant's work performance as "unacceptable"; and the close scrutiny and harsh criticism of his work. Dr. Price stated of major significance was that appellant never received a single comment about his job performance being unacceptable or unsatisfactory until after his supervisors became aware of his EEO complaint. Other medical reports and treatment notes from Dr. Price were submitted along with copies of emails and the complaints filed by appellant.

In an August 20, 2004 letter, the employing establishment controverted the claim. It denied that appellant was placed on the April 7, 2003 PIP as a form of reprisal but noted his performance had fallen below the "fully successful" level in a critical element. The employing establishment stated that appellant was repeatedly advised, both verbally and in writing, about the repeated errors in his work prior to being placed on the PIP. Although appellant received a "satisfactory" rating in his October 2002 performance appraisal, there was concern at that time regarding his lack of performance and it was believed that giving him a satisfactory rating would motivate him to perform better. The employing establishment further stated that appellant was denied a within grade increase based on his unacceptable performance. When the MSPB later restored the within grade increase, this did not change the fact that appellant's overall performance for that period was rate as "unacceptable."

By decision dated January 5, 2005, the Office denied appellant's emotional condition claim finding that he did not establish any compensable employment factors. On January 11,

2005 appellant requested an oral hearing on his claim, which was held September 21, 2005. He testified at the hearing and provided several personal statements, interoffice memoranda and electronic mailings which he contended were a form of harassment.

In a notice dated September 28, 2005, the Office provided appellant a copy of the hearing transcript and informed him that, in accordance with 20 C.F.R. § 10.617, the employing establishment was also provided a copy of the transcript. Appellant was informed that the employing establishment would be allowed 20 calendar days to submit comments or additional evidence. On October 27, 2006 the Office received an October 26, 2006 letter from the employing establishment requesting an extension of time. On October 31, 2005 the Office received correspondence from the employing establishment dated October 26 and 27, 2005 controverting appellant's claim. On top of both letters the employing establishment indicated that appellant was sent a copy by regular mail. In a separate certification sheet, the employing establishment advised that a complete copy of its submission was sent directly to the "claimant's representative, or to the claimant as appropriate." On October 26, 2005 the employing establishment stated that appellant voluntarily resigned from his employment under a settlement agreement that he entered into on November 12, 2003, a copy which was provided. As part of the settlement, appellant and his attorney agreed to dismiss his EEO and MSPB claims against the employing establishment. This also resolved the issue of appellant's performance and workload. The employing establishment asserted that appellant's workload was consistent with his job description and duties and noted that his coworkers were of lesser grades with lesser responsibilities. The employing establishment noted that Ms. Broadway denied ever yelling or screaming at appellant. It noted that appellant's claims of discrimination based on race were also resolved by the settlement agreement and denied appellant's assertion that no African American males had been hired in 27 years. In its October 27, 2005 letter, the employing establishment noted that at least 12 African American males were hired during the stated time period as opposed to the 5 originally asserted in the October 26, 2005 response.

By decision dated November 21, 2005, an Office hearing representative affirmed the January 5, 2005 decision, finding that appellant did not establish any compensable factors of employment.

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 her 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.[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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

[1] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[2] *Gregorio E. Conde*, 52 ECAB 410 (2001).

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.[3] If a claimant does implicate 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.[4]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[5] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[6] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[7]

For harassment or discrimination to give rise to a compensable disability under the Act, 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 Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.[8]

[3] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[4] *Id.*

[5] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[6] *See William H. Fortner*, 49 ECAB 324 (1998).

[7] *Ruth S. Johnson*, 46 ECAB 237 (1994).

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

ANALYSIS

Appellant alleged harassment and retaliation in his federal employment. The Board finds that appellant's allegations of harassment do not constitute a compensable employment factor. Rather they constitute his own perception of events and are insufficient to establish his claim for an employment-related emotional condition.[9] Appellant has not established a factual basis for his perceptions of reprisal or harassment by his supervisor following the filing of an EEO claim on September 22, 2002. He provided insufficient probative evidence to establish that harassment or reprisal occurred, as alleged.[10] While appellant submitted numerous emails from his supervisor critiquing his work performance, the Board finds this evidence does not establish that his supervisor harassed or discriminated against him.[11] While the hearing representative found that appellant's supervisor may have been "demanding and difficult to work with on occasion," there is no evidence to support that the supervisor's actions were unreasonable under the circumstances.

There is also no final decision from any administrative agency finding a hostile work environment or unwarranted disparate treatment toward appellant with regard to his claims of discrimination, harassment and retaliation. The employing establishment explained the reasons for placing appellant on a PIP. It further explained that, under the settlement agreement, the parties resolved all issues concerning appellant's claims of his performance, workload and racial discrimination.[12] There is no evidence to support appellant's contentions. The Board finds that appellant did not establish a compensable employment factor with respect to harassment and reprisal following the filing of his EEO claim.[13]

Appellant alleged that his placement on a PIP was in retaliation for his EEO Commission filing, that he was denied promotions because of the PIP and that he had a greater workload than his coworkers. Although the handling of disciplinary actions, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer rather than regular or specially assigned work duties of the employee.[14] The monitoring of an employee's work by a supervisor relates to administrative or personnel matters unrelated to the actual work duties to be performed. Such actions do not

[9] *See Barbara J. Latham*, 53 ECAB 316 (2002).

[10] *James E. Norris*, *supra* note 8.

[11] *See Charles D. Edwards*, 55 ECAB 258 (2004).

[12] *See Linda J. Edwards-Delgado*, 55 ECAB 401 (2004) (a settlement agreement in which the employing establishment did not admit wrongdoing or fault regarding the subject matter of appellant's allegations did not substantiate appellant's allegations pertaining to discriminatory actions or harassment by the employing establishment).

[13] *See Jamel A. White*, 54 ECAB 224 (2002).

[14] *Charles D. Edwards*, 55 ECAB 258 (2004); *Cyndia R. Harrill*, 55 ECAB 522 (2004).

fall within the coverage of the Act unless the evidence establishes error or abuse by employing establishment personnel.[15]

The Board finds no such error or abuse by appellant's supervisor in monitoring appellant's work. The emails relate to appellant's work assignments and actions taken to improve his performance based on a critical performance element. Appellant has not submitted evidence corroborating his assertions that his supervisors acted abusively. The fact that appellant may take issue with his supervisor's management style, without more by way of showing error or abuse, is insufficient to establish a compensable factor of employment.[16] Although appellant's within grade increase was restored, there is no showing of error or abuse by the employing establishment in the MSPB decision.[17] The record on appeal does not establish that the employing establishment erred in an administrative matter. Any stress appellant may have occurred as a result of being placed on a PIP and being denied a promotion is not compensable absent error or abuse by the employing establishment. The employing establishment provided reasonable explanations regarding why appellant was placed on the PIP.

While the evidence supports that appellant had a greater workload than his coworkers, the employing establishment noted that this was consistent with his job description and duties and that his coworkers were of lesser grades with lesser responsibilities. Furthermore, appellant did not allege that he sustained stress as a result of his workload or his regular job assignments. Rather, he attributed the development of his condition to conflicts with his supervisor about his work performance and his perceptions of harassment and retaliation for filing a complaint with the EEO Commission. Appellant has not established a compensable employment factor under the Act.

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.[18]

On appeal, appellant advances a procedural argument contending that the hearing representative should not have considered the evidence submitted by the employing establishment after it reviewed the hearing transcript, as it was untimely. He further argued that he was denied the opportunity to submit additional evidence to rebut the employing establishment's comments. Pursuant to 20 C.F.R. § 10.617(e) and (f), the employing establishment has 20 days after receiving a copy of the transcript to submit comments and additional evidence to the hearing representative. If such information is submitted, appellant or appellant's representative shall have an additional 20 days to respond to such comments or

[15] *Judy L. Kahn*, 53 ECAB 321 (2002).

[16] *See Donney T. Drennon-Gala*, 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005).

[17] The mere fact that actions of the employing establishment were later modified does not, in and of itself, establish error or abuse by management in its administrative duties. *Peter D. Butt Jr.*, 56 ECAB ___ (Docket No. 04-1255, issued October 13, 2004).

[18] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Lori A. Facey*, 55 ECAB 217 (2004).

evidence. In this case, the employing establishment indicated that it provided copies of its submissions to appellant but it does not appear that the Office provided copies to appellant. The Board finds that any error by the Office in not providing a copy of the employing establishment's submissions to appellant and allowing him an opportunity to respond was harmless. Appellant has adequate remedies for any error as he had the opportunity to respond to the Office with the submission of new evidence with a reconsideration request to the district Office. Appellant's opportunity to pursue his appeal rights, including this appeal to the Board, constitute meaningful post-deprivation processes whereby the government is able to address the procedural error after it occurs.[19] As noted, it appears that the employing establishment provided appellant with a copy of its submissions and appellant had approximately 21 days, from October 31 to November 21, 2005, to submit a response or additional evidence. However, no response or additional evidence was received.[20]

CONCLUSION

Appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

[19] *See Lan Thi Do*, 46 ECAB 366 (1994).

[20] Appellant submitted new evidence on appeal. However, the Board may not consider new evidence on appeal as its jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may submit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board