

On October 3, 2008 appellant, then a 50-year-old compliance safety and health officer, filed a traumatic injury claim alleging that, while conducting an inspection of a job site, on

August 28, 2008 the employees were instructed to refuse to give her information and were argumentative. She noted that she called the owner, Terry Mertz, who allegedly continuously verbally abused her on the telephone. Specifically, appellant alleged that Mr. Mertz started screaming at her, stated that the employing establishment was out to ruin him, and stated that he just got two other inspections from the employing establishment. Mr. Mertz yelled at her that she had no right to inspect his company and informed her that he was going to call his congressman, newspapers and television and tell them that the employing establishment was trying to put him out of business. He also allegedly screamed at appellant that he was not going to give her any information and that she had no right to harass him or his employees. Appellant indicated that, as a result of this incident, she experienced an exacerbation and aggravation of previously diagnosed general anxiety disorder. The employing establishment controverted her claim for continuation of pay as untimely and also indicated that this should be treated as an occupational disease claim.

By letter dated October 17, 2008, the Office requested further information.

In an August 29, 2008 report, Dr. Paul Bernstein, a licensed clinical psychologist, saw appellant on that date for a continuing assessment of her emotional status with regard to work. He noted that appellant found things more stressful and that she was recently requested to visit an accident site and refused. Dr. Bernstein noted that she was developing a greater sensitivity to workplace accidents and could no longer focus adequately on her job. In a September 8, 2009 note, he noted that on his last visit with appellant on August 29, 2008 he became quite concerned about the deterioration of her emotional status. Dr. Bernstein recommended that appellant be granted a medical leave of absence. In an October 6, 2008 report, he noted that appellant had been diagnosed in August with generalized anxiety disorder, that by October these problems had increased in intensity and that she was showing classic symptoms of post-traumatic stress disorder. Dr. Bernstein noted several incidents at work that contributed to this condition, including the August 28, 2008 incident at Terry's Plumbing. He noted that appellant relayed to him that on August 28, 2008 four or more employees of Terry's Plumbing angrily confronted her and that when she telephoned her supervisor, he also chastised her. Dr. Bernstein noted that during his meeting with appellant on August 29, 2008 she claimed she had been adversely affected by her experience at Terry's Plumbing and that her preexisting conditions of being unable to sleep, difficulty concentrating, fatigue, dizziness, anxiety, lost confidence and memory difficulties had escalated. He also submitted additional reports documenting appellant's treatment for symptoms of post-traumatic stress disorder and generalized anxiety disorder.

Appellant submitted a note indicating that the other stress in her life, other than her employment, involved a contested guardianship proceeding in West Virginia regarding her elderly mother.

In an undated and unsigned statement by appellant received by the Office on November 20, 2008, she indicated that she was requested to conduct an investigation of Terry's Plumbing on August 28, 2008. She noted that when she arrived she observed employees standing at the site watching an operator of an excavator dig a hole and that when the operator removed the spoil from the hole, the bucket passed over the heads of the employees and the mud was placed in the back of a dump truck. Appellant noted that she observed that across the street was a trench two feet wide and twelve feet deep but no one was in it when she arrived. She

indicated that, while speaking with the employees, Mr. Mertz approached her and started screaming at her, yelling that the employing establishment was out to ruin him and that he had just had two other inspections. He yelled that she had no right to inspect his company and that he never cut corners. Mr. Mertz angrily told her that she had no right to harass him and that he wanted to speak with her supervisor. Appellant stated that she gave him her supervisor's telephone number, that to the best of her knowledge he did call her supervisor, and that he may corroborate the fact that Mr. Mertz had an angry confrontation with appellant. She noted that she was unable to obtain any corroborating evidence. Appellant also submitted an "Inspection Narrative" for Terry's Plumbing.¹

By decision dated November 21, 2008, the Office denied appellant's claim as it found that she had not established a compensable factor 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 his 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.² 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.³

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.⁴ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes cause or adversely affected the condition or conditions for which compensation is claimed.⁵

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

¹ This document is not signed. Although it appears to be written by appellant, the writer of the document is not clear as only a number is given, not the investigator's name. The document appears to discuss the August 28, 2008 incident, but there are two different dates on the document: September 16 and 26, 2008.

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

³ *Gregory E. Conde*, 52 ECAB 410 (2001).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

compensable factor of employment and the record establishes the truth of the matter asserted, the Office's decision must be based on an analysis of the medical evidence.⁶

ANALYSIS

In the instant case, appellant alleged that she suffered from an exacerbation of previously diagnosed general anxiety disorder. She attributes this to a specific incident that occurred when she, while working as a compliance safety and health officer, was harassed by Mr. Mertz and various employees of Terry's Plumbing.⁷ For harassment to give rise to a compensable disability under the Act, there must be evidence that the harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.⁸ Appellant alleged that the employees would not cooperate with her and that she was "screamed at" by Mr. Mertz, who told her she had no right to inspect his company. Mr. Mertz indicated that he was going to contact his congressman, newspapers and television and that appellant had no right to harass his employees. Appellant also alleged that the employees refused to cooperate with her inspection. However, there is no evidence to corroborate her allegations. Appellant indicated that Mr. Mertz spoke with her supervisor, but there is no statement from her supervisor. Further, when she filed her complaint, appellant indicated that she spoke with Mr. Mertz on the telephone, yet when describing this event in a later statement, she stated that Mr. Mertz approached her. Although appellant's psychologist mentioned the Terry Plumbing incident in his report of October 6, 2008, more contemporary reports, including one for a session held just one day after the alleged incident on August 29, 2008, do not mention the Terry's Plumbing incident. These inconsistencies in the evidence cast serious doubt on appellant's recitation of the facts of August 28, 2008.⁹

Accordingly, the Board finds that the Office properly denied appellant's claim for an emotional condition as she failed to establish a compensable factor of employment.¹⁰

CONCLUSION

The Board finds that appellant failed to establish that she sustained an emotional condition as a result of an August 28, 2008 employment incident.

⁶ See *Normal L. Blank*, 43 ECAB 384 389-90 (1992).

⁷ Office regulations distinguish claims of traumatic injury from those for occupational disease. A traumatic injury means a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift. An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q), (ee), respectively; *Andy J. Paloukos*, 54 ECAB 712 (2003). As appellant filed a claim for an incident that occurred on August 28, 2008, the Office properly treated this claim as an occupational disease claim.

⁸ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁹ *Cameron Dickerson*, 36 ECAB 409 (1985); *Joseph Albert Fournier*, 35 ECAB 1175 (1984).

¹⁰ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Margaret v. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 21, 2008 is affirmed.

Issued: November 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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