

On April 19, 2001 appellant, then a 41-year-old electronic technician, filed an occupational disease claim (Form CA-2) alleging that he suffered from extreme workplace stress. He stated that he was “chronically harassed by [his] acting supervisor” and this “escalated

to the point where it became humanly untenable.” Appellant identified April 14, 2001 as the date he first realized his condition was caused or aggravated by his employment. In support of his claim, appellant submitted an April 18, 2001 letter from Dr. Mirza H.A. Baig, a Board-certified family practitioner, who stated that appellant suffered from extreme workplace stress and he was scheduled to see a psychiatrist on April 24, 2001. Dr. Baig recommended that appellant remain off work until his stress level could be reduced and properly managed.

By letter dated April 23, 2001, the employing establishment challenged appellant’s claim. James J. Pleffner, supervisor, maintenance operation T-2, in his statement, stated that appellant lost his father in March and returned to work on March 23, 2001; a week after putting his father to rest. Mr. Pleffner further stated that appellant expressed his upset and disappointment to him over the loss of his father and questioned why no one had put up a sign in the building informing everyone of the passing of his father. He also advised that on Saturday, April 14, 2001 Bob Rhoe, acting supervisor, assigned appellant to printer calls and PMs. Appellant reportedly expressed his opinion about electronic technicians performing printer PMs and calls. Although appellant did not feel that this was his job, he reported to his assignment. Mr. Pleffner explained that electronic technicians were required to work on, and have working knowledge of high speed induction lines. Lastly, Mr. Pleffner stated that appellant took annual leave on April 15, 2001 and called in sick April 16, 2001, and had yet to return to work.

By letter dated May 7, 2001, the Office asked the employing establishment to further respond to appellant’s allegations. The employing establishment did not respond. The Office also wrote appellant on May 7, 2001 requesting that he provide additional factual and medical information. In response, appellant submitted disability slips dated April 24 and May 8, 2001 from Dr. Sheryl Anderson, a psychiatrist. Appellant also advised the Office that Mr. Rhoe had continually harassed him on an escalating basis for approximately two years. He stated that he reported Mr. Rhoe’s harassment on April 13, 2001 and the following day Mr. Rhoe threatened him. Mr. Rhoe’s behavior toward appellant had reportedly been witnessed by a coworker, Tom Snow.

Appellant attached a copy of an April 26, 2001 letter he had written to William T. Burkes, manager of maintenance operations, regarding Mr. Rhoe’s behavior. In this letter, appellant stated that Mr. Rhoe had a propensity to draw attention to his crotch with a hand gesture. He further stated that Mr. Rhoe did this when asking him to perform a maintenance task or simply whenever he felt like it. Appellant explained that this had gone on for about two years and he could no longer tolerate this harassment. He informed Mr. Burkes that he reported Mr. Rhoe’s behavior to Dwayne Clomax on April 13, 2001 and the following day Mr. Rhoe threatened him in Mr. Snow’s presence. On April 14, 2001, Mr. Rhoe reportedly stated in a loud and angry voice: “Don’t ever falsely accuse me of anything. When I give you a sign you’ll know it.” In a June 1, 2001 letter from Mr. Clomax he wrote: “In response to your request for a written statement concerning your alleged incident with a coworker, I have taken appropriate action with regard to this situation.”

With regard to other stressors in his life, appellant mentioned that his father passed away at the age of 83 on March 7, 2001. Appellant stated that his father’s death was expected and that he had taken two weeks off to grieve and be with his family. He further stated that he had been back to work for a month when Mr. Rhoe threatened him.

In a decision dated June 13, 2001, the Office denied appellant's claim because he failed to establish that his claimed emotional condition arose in the performance of duty. Appellant requested an oral hearing, which was held on December 18, 2001. Appellant submitted a copy of an April 18, 2001 letter he wrote to the Postal Inspector's office regarding Mr. Rhoe's alleged threat on April 14, 2001. The hearing representative also received a copy of a May 21, 2001 follow-up letter appellant wrote to Mr. Burkes inquiring as to what action had been taken regarding Mr. Rhoe's inappropriate behavior. By decision dated April 12, 2002, the Office hearing representative affirmed the June 13, 2001 decision denying appellant's claim.

LEGAL PRECEDENT

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.² Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.³

ANALYSIS

Appellant alleged that Mr. Rhoe repeatedly made crude hand gestures and threatened him on April 14, 2001 after learning that appellant complained to management about his obscene behavior. Appellant characterized the alleged repeated hand gestures as sexual harassment. Appellant interpreted Mr. Rhoe's words and demeanor as a threat. The Office hearing representative denied the claim because appellant did not allege any compensable factors of employment. However, she erroneously characterized Mr. Rhoe's allegedly obscene hand gestures as an administrative action pertaining to supervision. Drawing attention to one's crotch, if established, cannot reasonably be characterized as a legitimate supervisory function.

¹ See *Kathleen D. Walker*, 42 ECAB 603 (1991).

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

³ *Ruthie M. Evans*, 41 ECAB 416 (1990).

The hearing representative also incorrectly characterized Mr. Rhoe's alleged April 14, 2001 threat as harassment and she erroneously stated that the employing establishment denied that appellant was subjected to discrimination and harassment. To the extent the words appellant attributed to Mr. Rhoe on April 14, 2001 can be factually established, the Office should determine whether Mr. Rhoe's actions constitute verbal abuse or threats of physical violence, rather than general harassment.⁴ Additionally, contrary to the Office hearing representative's statement, the employing establishment did not deny that appellant was subjected to discrimination and harassment. In the instant case, the employing establishment did not specifically deny any of appellant's allegations. Mr. Pleffner's April 23, 2001 letter makes no mention of Mr. Rhoe's alleged hand gestures or the remarks appellant attributed to Mr. Rhoe on April 14, 2001. Mr. Pleffner merely speculated that appellant was perhaps distressed over the recent loss of his father and bothered by the assignment he received on April 14, 2001. However, this letter does confirm that appellant and Mr. Rhoe were both present at work on Saturday, April 14, 2001. Despite the numerous letters appellant wrote to the employing establishment regarding Mr. Rhoe's behavior, the only arguably responsive correspondence is a June 1, 2001 letter from Mr. Clomax in which he wrote: "In response to your request for a written statement concerning your alleged incident with a coworker, I have taken appropriate action with regard to this situation."

Appellant has made allegations against Mr. Rhoe regarding a threat on April 14, 2001 and so-called sexual harassment in the form of repeated crude hand gestures.⁵ The record is devoid of any evidence contradicting appellant's allegations. The Office never requested that the employing establishment respond to the specific employment incidents appellant identified in response to the Office's May 7, 2001 request for additional information. At oral argument appellant was unaware of the existence or results of any investigation undertaken by the employing establishment concerning Mr. Rhoe's alleged threatening behavior. Appellant further stated that he did not attempt to obtain a witness statement from Mr. Snow because he believed it was unlikely Mr. Snow would reduce it to writing because of his long-standing friendship with Mr. Rhoe. The Office should attempt to obtain a written statement from Mr. Rhoe and Mr. Snow.

Office regulations provide that an employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to the Office that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position.⁶ The applicable regulation further provides that the employer may include

⁴ The Board has recognized that verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances. This, however, does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Federal Employees' Compensation Act. *Fred Faber*, 52 ECAB 107, 109 (2000). Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute compensable factors of employment. *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

⁵ For harassment to give rise to a compensable disability there must be evidence that harassment did, in fact, occur. A claimant's mere perception of harassment is not compensable. *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996). The allegations of harassment must be substantiated by reliable and probative evidence. *Joel Parker Sr.*, 43 ECAB 220, 225 (1991).

⁶ 20 C.F.R. § 10.117(a) (1999).

supporting documents such as witness statements, medical reports or records, or any other relevant information.⁷ If the employer does not submit a written explanation to support the disagreement, the Office may accept the claimant's report of injury as established.⁸

The case will be remanded to the Office to request that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of all statements provided by appellant relative to his claim. If the employing establishment does not respond to the Office's request, the Office may accept appellant's allegations as factual in accordance with its regulations.⁹

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision.

Issued: February 11, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member

⁷ *Id.*

⁸ See 20 C.F.R. § 10.117(b). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Occupational Illness*, Chapter 2.806.4 (d)(1) (October 1995).

⁹ *Alice F. Harrell*, 53 ECAB ____ (Docket No. 01-1249, issued August 1, 2002).