



By letter dated February 4, 2005, the employing establishment controverted the claim. In a statement dated March 17, 2004, the employing establishment denied appellant's allegations of harassment and intimidation.

By letter dated February 8, 2005, the Office requested that appellant submit further information in support of his claim. In a letter dated August 25, 2005, appellant stated that his difficulty in falling asleep was based on the continual harassment by the FMLA coordinator, beginning August 3, 2004, resulting from his request for FMLA leave. He noted that the FMLA coordinator who was handling his claim has been removed from that assignment and that his FMLA leave was subsequently approved.

Appellant also submitted documentation with regard to a grievance he filed with the union alleging harassment by the FMLA coordinator. The union representative argued that on July 9, 2004 notice was sent to appellant informing him of the need to provide recertification from his health care provider for FMLA leave from July 3 through 6, 2004 and that the reason for this request was that in the opinion of the FMLA coordinator there was a pattern of FMLA usage in connection with holidays and nonscheduled days. The union contended that appellant had complied with all requests and that the FMLA coordinator had acted in a discriminatory, arbitrary and capricious manner towards him. A settlement agreement was signed by representatives of the employing establishment and the union on December 27 and 28, 2004 indicating that appellant had been recertified for FMLA leave and that all subsequent requests for FMLA protected leave from July 10, 2004 shall be approved. The agreement specifically noted that the settlement was without prejudice and cannot be cited in any judicial or administrative forum for any purpose other than to show that settlement occurred.

In further support of his claim, appellant submitted the records from Memorial Hospital detailing his emergency visit of December 1, 2004. These records include a December 1, 2004 report by Dr. Linda R. Sturtevant, a physician who is Board-certified in emergency medicine, wherein she indicated that she informed appellant that she would not sign a statement that his insomnia was caused by harassment on the job as that was an issue that would have to be dealt with outside of the emergency room. In a medical report dated December 2, 2004, Dr. Thomas K. Reichert, a Board-certified family practitioner, indicated that appellant was excused from work from December 1 to 2, 2004, but that he may return to work on December 3, 2004 without restrictions. He noted that appellant was having some problems with "insomnia and anxiety causing some increased fatigability" but that he did "not feel there is anything to suggest that this may be a long-term issue or interfere with his work."

By decision dated August 9, 2005, the Office denied appellant's claim for the reason that he failed to establish that he sustained an injury as defined by the Federal Employees' Compensation Act.

### **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 Act.<sup>1</sup> 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.<sup>2</sup>

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>3</sup> A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>4</sup> The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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

<sup>2</sup> *Gregory E. Conde*, 52 ECAB 410 (2001).

<sup>3</sup> See *Michael Ewanichak*, 48 ECAB 364 (1997).

<sup>4</sup> See *Charles D. Edwards*, 55 ECAB \_\_\_\_ (Docket No. 02-1956, issued January 15, 2004).

<sup>5</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>6</sup> *Beverly R. Jones*, 55 ECAB \_\_\_\_ (Docket No. 03-1210, issued March 26, 2004).

<sup>7</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>8</sup> *Id.*

### ANALYSIS

Appellant attributed his condition to harassment by the FMLA coordinator with regard to his request for FMLA leave. The Board has held that action of an employer which the employee characterizes as harassment may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment or discrimination in fact did occur.<sup>9</sup> Mere perceptions and feelings of harassment will not support an award of compensation.<sup>10</sup> In the instant case, the employing establishment denied that the harassment occurred. Appellant has made generalized statements regarding the harassment but did not describe specific instances. It is clear that appellant has filed a grievance with respect to the FMLA coordinator, but there are no findings of error or admission of error or other probative evidence that would establish a compensable work factor. The settlement agreement specifically states that it is without prejudice and cannot be used in any judicial or administrative proceeding for any purpose other than to establish that a settlement occurred. The allegations made in the union report are unsubstantiated by any witness statements. Unsubstantiated allegations of harassment are not determinative of whether such harassment occurred.<sup>11</sup>

The Board finds that appellant has failed to establish a compensable factor of employment with regard to these allegations and consequently has not met his burden of proof in establishing his claim for an emotional condition.<sup>12</sup>

### CONCLUSION

The Office properly denied appellant's claim for an emotional condition causally related to his federal employment.

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<sup>9</sup> *Lori A. Facey*, 55 ECAB \_\_ (Docket No. 03-2015, issued January 6, 2004).

<sup>10</sup> *Id.*

<sup>11</sup> *Kathleen A. Donati*, 54 ECAB 759 (2003).

<sup>12</sup> Where a claimant has not established any compensable employment factors, it is not necessary to consider the medical evidence of record. *Peter D. Butt, Jr.*, 56 ECAB \_\_ (Docket No. 04-1255, issued October 13, 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 9, 2005 is affirmed.

Issued: October 3, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board