

**United States Department of Labor
Employees' Compensation Appeals Board**

S.B., Appellant

and

**DEPARTMENT OF LABOR, BUREAU OF
LABOR STATISTICS, Washington, DC,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1729
Issued: January 8, 2009**

Appearances:

*Stephen D. Scavuzzo, Esq., for the appellant
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 June 3, 2008 appellant, through his attorney, filed a timely appeal from a January 29, 2008 merit decision of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 28, 2006 appellant, then a 51-year-old information technology specialist, filed an occupational disease claim alleging that on March 2, 2006 he realized that his hypertension was caused by his supervisor's harassment.

By letter dated April 19, 2006, the Office informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised to submit additional medical and factual evidence in support of his claim.

The Office received medical notes dated March 2, 14 and 28 and April 3, 2006 from Dr. Henry W. Williams, a treating cardiologist; timesheets for the period February 19 to April 15, 2006; a March 3, 2006 fax from appellant requesting four weeks of medical leave; a March 6, 2006 fax from appellant requesting 64 hours of advanced annual leave due to illness, a May 10, 2006 letter from the employing establishment responding to the Office's April 19, 2006; leave slips approving the use of leave for the periods February 28 to March 3, March 7 to 31 and April 3 to 14, 2006; appellant's position description; a March 31, 2006 request for clarification of medical documentation for the period March 28 to April 14, 2006 from Charles Bose, Division Chief; faxes dated March 31 and April 3, 2006 from appellant requesting leave for the period March 28 to April 14, 2006; e-mails regarding appellant's schedule; a February 28, 2006 leave restriction memorandum; a March 17, 2006 fax from appellant detailing leave used for the period February 28 to March 3, 2006; a leave slip requesting the use of 64 hours of advanced annual leave due to illness for the period March 8 to 17, 2006;¹ and a note from Howard University hospital emergency room noting that appellant was seen on February 28, 2006 and could return to work on March 4, 2006.

On February 28, 2006 Mr. Bose placed appellant on leave restriction due to the excessive use of sick and annual leave used. He noted that appellant had failed to complete 80 hours of work since January 2005. Appellant was informed that these frequent absences adversely impacted on the office's operation and were disruptive.

On May 10, 2006 the employing establishment controverted appellant's claim that Mr. Bose had harassed him. It noted that on February 28, 2006 appellant was issued a leave restriction memorandum due to leave abuse. Appellant did not report to work after February 28, 2006 and separated from the employing establishment on April 15, 2006.

By decision dated May 22, 2006, the Office denied appellant's claim.

Subsequent to the denial of his claim, the Office received appellant's response to the Office's request for additional information as well as medical evidence including medical tests, an April 6, 2006 report from Dr. Williams, clinical notes for the period September 5, 2005 to February 25, 2006; and a March 21, 2006 Howard University hospital report. Appellant alleged that he felt threatened and harassed after Mr. Bose became his supervisor. He alleged that excessive and hectic demands, long hours and impossible deadlines adversely impacted his health and made work intolerable. After Mr. Bose arrived six months prior, appellant was subjected to a hostile work environment. Appellant noted that Mr. Bose approved his request to meeting with the Office of Employment Unemployment Statistics (OEUS) to discuss NetBackup configuration concerns; however, following the meeting, Mr. Bose sent an e-mail to OEUS that appellant had been instructed not to address operational issues. He alleged that Mr. Bose sent him an e-mail advising that appellant was to sign out when he left to use the fitness center and to sign in again after his return. Appellant contended that he did not need to sign out if he used the

¹ There is no checkmark on the form indicating whether the leave was approved or disapproved.

fitness center during his lunch period as long as it was under an hour. He stopped using the fitness center as he did not want to be charged with insubordination and was awaiting verification from personnel, which occurred three weeks later. Appellant alleged that Mr. Bose pressured him to change his work schedule so that he did not arrive before 7:00 a.m. even though flexitime hours allowed him to arrive as early as 6:00 a.m. Mr. Bose also allegedly pressured appellant to stop participating in flexitime so that he would have sufficient opportunity to discuss appellant's tasks and conduct meetings with him. Appellant also alleged that Mr. Bose improperly denied his request for four hours of administrative leave when he donated blood. He alleged that he was improperly placed on leave restriction.

On April 6, 2006 Dr. Williams detailed the dates appellant was examined and the results of the tests performed. He diagnosed headaches, shortness of breath and uncontrolled hypertension.

In a letter dated July 3, 2006, appellant requested reconsideration.

On September 28, 2006 the Office received copies of e-mails regarding work issues including NetBackup, Enterprise Backup Server Admin Meeting, Veritas Project Schedule, USB flash drives and Certification Report. Appellant also submitted e-mails to Mr. Bose regarding the use of the fitness center during lunch, compensatory time, credit time and overtime and administrative leave for donating blood.

In an e-mail dated October 14, 2005, Mr. Bose requested that appellant adjust his schedule so that he did not arrive at work before 7:00 a.m. In a subsequent e-mail that day, he informed appellant that he was "not requesting you stop [to] participating in [f]lexitime," but trying to find an available time so he and appellant could meet and review tasks. If appellant's flexitime schedule was disrupted alternatives would be discussed that would accommodate appellant.

In an October 21, 2005 e-mail Diane Atchinson informed Mr. Bose that up to four hours of administrative leave could be given for donating blood. In another e-mail dated October 21, 2005, Amy Sandifer informed Mr. Bose that administrative leave was given only for the time needed to donate blood and return to the office, which was usually about ½ to 1 hour. Four hours of administrative leave could be given in situations where a person donating blood needed additional time to rest.

On October 2, 2006 the Office received the employing establishment's September 22, 2006 response to appellant's statement. It noted that Mr. Bose did not ask appellant to work longer hours or extend his schedule to complete work assignments. Appellant did not advise his supervisor of his medical issues or allegations of harassment and hostile work until he was placed on leave restriction. It noted that Mr. Bose provided guidance to assist appellant with completing his work assignment. It also denied that appellant was barred from using the fitness center. As to leave for the blood drive, it noted that appellant did not request leave until the day before the blood drive even though the blood drive is advertised five days before it begins. Mr. Bose requested that appellant adjust his schedule in order that they could meet and discuss his assignments and tasks. Appellant was placed on leave restrictions due to his excessive use of leave.

By decision dated December 11, 2006, the Office denied modification of the May 22, 2006 decision.

Appellant filed an appeal with the Board on April 13, 2007. On November 19, 2007 the Board issued an order dismissing appellant's appeal.²

On November 19, 2007 appellant's counsel requested reconsideration. In a July 28, 2007 statement, Dennis W. Durham, a retired employee, detailed incidents involving his internal twins with Mr. Bose.

By decision dated January 29, 2008, the Office found the evidence submitted insufficient to warrant modification of the May 22, 2006 decision.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.³ There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.⁴

Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁵ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁶

ANALYSIS

The Board finds that appellant has failed to submit sufficient evidence to establish his allegations that his supervisor engaged in harassment, intimidation or discrimination. Appellant alleged that Mr. Bose harassed him, but did not provide sufficient evidence to support his

² Docket No. 07-1276 (issued November 19, 2007).

³ See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

⁴ See *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007); *Ruth C. Borden*, 43 ECAB 146 (1991).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Id.*

allegations that harassment occurred.⁷ Mere perceptions of harassment or discrimination are not compensable; a claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.⁸ The only evidence appellant submitted regarding his allegation of harassment is a July 28, 2007 statement by Mr. Dunham. However, Mr. Dunham did not address any alleged incident of harassment involving Mr. Bose and appellant. Rather, he discussed his own interactions with Mr. Bose. This evidence is insufficient to establish appellant's allegations as factual. Mr. Dunham did not address Mr. Bose's treatment of appellant. Appellant has not submitted evidence sufficient to establish that Mr. Bose engaged harassment towards him or created a hostile workplace environment.

The employing establishment denied appellant's allegations that he was subjected to a hostile work environment and wrongly placed on leave restriction. In the leave restriction memorandum, Mr. Bose noted that appellant was placed on leave restriction due to the excessive amount of leave used from January 2005 and the fact that he had not worked 80 hours during that period. Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable as factors of employment.⁹ Appellant also alleged that Mr. Bose requested that he stop participating in flexitime. The record establishes that Mr. Bose requested that appellant not arrive at work before 7:00 a.m. However, he did not ask appellant to stop participating in the flexitime schedule. The e-mails from Mr. Bose reflect that appellant was asked to alter his flexitime schedule in order to allow them to meet and discuss his tasks and work assignments. He informed appellant that he was not being asked to stop participating in flexitime and that adjustments would be made. The Board finds that the evidence does not support appellant's contention that Mr. Bose had requested him to cease participating in flexitime. Appellant alleged that his supervisor engaged in actions, which he believed constituted harassment, but he provided no evidence, such as witness statements, to establish his allegations as factual.¹⁰

The Board also finds that the evidence of record is insufficient to substantiate appellant's allegations that his managers committed error or abuse in their administrative actions. While appellant alleged abuse on the part of management in monitoring his leave, the record reflects that these actions were necessitated by his excessive use of leave. He alleged that Mr. Bose wrongly denied his request for four hours of administrative leave when donating blood, questioned his use of the fitness center and wrongly requested him to adjust his flexitime schedule. The Board finds that the record does not disclose evidence of administrative error or abuse. Therefore, appellant has not established a compensable employment factor. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.¹¹ Appellant

⁷ See *M.D.*, 59 ECAB ____ (Docket No. 07-908, issued November 19, 2007); *Joel Parker, Sr.*, 43 ECAB 220 (1991) (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

⁸ *J.F.*, 59 ECAB ____ (Docket No. 07-308, issued January 25, 2008).

⁹ *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

¹⁰ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹¹ See *Robert G. Burns*, 57 ECAB 657 (2006); *Alfred Arts*, 45 ECAB 530 (1994).

has not presented sufficient evidence that his manager acted unreasonably or committed error with regard to the personnel matters asserted.

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.¹² However, error or abuse by the employing establishment in an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administrative or personnel matter, may afford coverage.¹³ There is no evidence of record to substantiate appellant's allegation that Mr. Bose arbitrarily and unfairly denied his request for annual, sick and administrative leave. While appellant was placed on leave restriction on February 28, 2006, the record shows that Mr. Bose approved appellant's requests for leave for the period February 28 to April 14, 2006. He contended that Mr. Bose wrongly denied his request for four hours of administrative leave for blood donation. However, the record shows that while up to four hours could be granted for blood donation, the usual amount of time allowed for such purposes was up to one hour. The October 21, 2005 e-mail from Ms. Sandifer to Mr. Bose advised that administrative leave for blood donation was to cover the time needed to donate blood and return to the office. Four hours of administrative leave was to be given in situations where the person donating blood needed additional time to rest. Appellant provided no evidence that he required additional time following his blood donation to rest. He has failed to establish that these actions demonstrated error or abuse on the part of management and are not compensable.

In the present case, appellant generally alleged that he was required to work excessive hours, was given impossible deadlines and his workload became hectic and excessive. However, he did not submit evidence to establish deadlines for his work or how his work became hectic or excessive since the arrival of Mr. Bose or specific examples of the hours and days he worked. As appellant has not provided any evidence supporting his general allegations regarding overwork, he has failed to establish a compensable factor of employment under *Cutler*.

The Board finds that appellant has not established a compensable work factor. For this reason, the medical evidence will not be considered.¹⁴

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty

¹² *J.C.*, 58 ECAB ____ (Docket No. 07-530, issued July 9, 2007); *Elizabeth Pinero*, 46 ECAB 123 (1994).

¹³ *Margreate Lublin*, 44 ECAB 945 (1993).

¹⁴ *See J.C.*, 58 ECAB ____ (Docket No. 07-530, issued July 9, 2007); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2008 is affirmed.

Issued: January 8, 2009
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