

overwhelmed at work. He noted having a heavy workload and changing workplace demands. Appellant stopped work on December 5, 2008. James Parker, appellant's director, noted that appellant's workload was commensurate with the other specialists and he never reprimanded him for poor performance. He noted that appellant met his core requirements but needed to improve his writing and math skills. Mr. Parker provided him opportunities to train and improve and agreed to grant him leave because he had preexisting health problems and personal issues and had worked 15 months without a vacation.

On January 16, 2009 the Office asked appellant and the employing establishment to provide additional evidence.

In a January 6, 2009 statement, appellant alleged that beginning in September 2008 he had a tremendous workload and felt overwhelmed. He asserted that he was involved in reestablishing his program area before the new fiscal year and had several analysis reports due, training sessions to complete, meetings and briefings and was tasked with instituting a new report of analysis. Appellant indicated that he also had several ad hoc requests that needed attention and was assigned an intern, who needed daily guidance, for 12 weeks. He often worked 3 hours extra on weeknights and 10- to 14-hour days on weekends. Appellant received assistance but it was insufficient and he fell behind on the due dates. He advised that he had a couple of talks with his supervisor about his work performance and was told he was not doing well and reported being reprimanded for performance. Appellant felt as though everything he submitted was incorrect and that he was not meeting the "goal of desired perfection." He alleged that on November 18, 2008 he had a meeting with his supervisor about his performance and his symptoms and decided to take some time off. When appellant returned to work on December 2, 2008, the volume of work had not decreased and he did not get any better.

In a January 22, 2009 statement, Mr. Parker noted that appellant began working on August 20, 2007 and spent time with each program manager and the business liaison to learn more about his program area. Appellant received orientation and training before assuming the program areas and spent a week with the former program manager in April 2008 learning about the program. Mr. Parker specified actions for which appellant was responsible in 2008 and advised that these responsibilities were similar to those of all program managers. He stated that he expected each person to plan and manage his workload with little or no supervision. Mr. Parker indicated that each program manager used a schedule of deliverables to plan and manage workloads and each person was responsible for letting him know if he could not timely complete an action. He used the applicable performance plan and aspects of each critical job element to give feedback and to evaluate the performance of employees. Mr. Parker advised that there was a decrease in appellant's performance in completing the formal complaint analysis, communicating results of statistics and data collection; but, he continued to perform at the fully successful level. He spoke with appellant about how he could improve and assigned a specialist from his staff and two specialists from the business liaison office to assist appellant. Mr. Parker indicated that at no time did he reprimand appellant for his performance and never communicated a goal of "desired perfection." As appellant's first level manager he assigned and evaluated his work and performance and routinely met with program managers to talk about their deliverables and projects. Mr. Parker noted meeting with appellant during the fourth quarter of 2008 to discuss the progress on the formal complaint analysis but noted that he was doing well in the other program areas. He assigned three EEO specialists to assist appellant; however, he still

had difficulty completing the analysis. Mr. Parker indicated that on November 18, 2009 he met with appellant and he informed him that his wife wanted him to see a doctor. He believed appellant's issue was due to a preexisting condition that appellant developed while in the Marine Corps. Mr. Parker indicated that he was not informed that appellant was depressed or overwhelmed from work.

On January 22, 2009 Mr. Parker approved appellant's request for leave from December 15, 2008 to March 13, 2009. In appellant's leave applications, Mr. Parker noted that appellant sought leave for a personal serious health condition.

Appellant submitted emergency room records medical reports from Trinity West Urgent Care, including a December 8, 2008 report from Dr. Raymond Sommer, Board-certified in emergency medicine, who diagnosed depression. The records noted that appellant reported being overwhelmed at work and having a depressive episode two to three years earlier. In a December 12, 2008 form report, Dr. Moolamalla Praveen, a Board-certified psychiatrist, noted that appellant was incapacitated and hospitalized from December 8 to 12, 2008, as he was not functioning at work or socially.

In a February 10, 2009 statement, appellant indicated that he had memory loss due to his illness which occurred over a period of time and was unable to provide any further details about aspects of his workload.

Appellant submitted Texas workers' compensation work status reports dated January 15 to February 5, 2009, prepared by Dr. Chau Ngoc Tran, a Board-certified psychiatrist, who treated appellant for major depression due to increased stress at work and advised that appellant was totally disabled for that period. On January 27, 2009 appellant was treated by Betty Anne Derryberry, a counselor, for major depression that began after working 12- to 16-hour days at work. A January 29, 2009 report from Dr. Cathal P. Grant, a Board-certified psychiatrist, diagnosed major depression and noted that appellant listed work stressors and a heavy workload.

In a decision dated December 4, 2009, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,³ the Board

² *George H. Clark*, 56 ECAB 162 (2004).

³ 28 ECAB 125 (1976).

explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁴ When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁵ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁷ Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁸ 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.⁹

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.¹⁰ 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹¹

ANALYSIS

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.¹² Appellant alleged that his claimed condition arose, in part, because he was overwhelmed by

⁴ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁵ *Lillian Cutler*, *supra* note 3.

⁶ *J.F.*, 59 ECAB 331 (2008).

⁷ *M.D.*, 59 ECAB 211 (2007).

⁸ *Roger Williams*, 52 ECAB 468 (2001).

⁹ See *Lillian Cutler*, *supra* note 3.

¹⁰ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹¹ *Id.*

¹² *Penelope C. Owens*, 54 ECAB 684 (2003); see *Lillian Cutler*, *supra* note 3.

performing his work assignments beginning in September 2008. He was involved in reestablishing his program area before the new fiscal year and had several analysis reports due, training sessions to complete, meetings and briefings to attend and was tasked with instituting a new report of analysis. Appellant also had several ad hoc requests that needed attention and was assigned an intern for 12 weeks who needed daily guidance. He stated that these duties led to his depression. The Board finds that appellant has established a compensable factor of employment under *Cutler* with respect to the work performed to finish his assigned duties before the end of the 2008 fiscal year and having to provide guidance to an assigned intern for 12 weeks. Appellant's supervisor, Mr. Parker, confirmed his duties in 2008 which are consistent with appellant's allegations. Appellant was in the performance of his regular or specially assigned duties while attending to these matters and they are compensable factors under *Cutler*.¹³

Appellant further alleged that he was overworked. He stated that he could not complete his assigned duties in a regular 8-hour day and sporadically worked weeknights and sometimes worked 10 to 14 hours on weekends.¹⁴ Appellant received assistance but that this was insufficient and he fell behind on the due dates. The Board has held that overwork, when substantiated by sufficient factual information to corroborate the claimant's account of events, may be a compensable factor of employment.¹⁵ However, the record does not contain sufficient evidence to establish that appellant worked more than 40 hours a week or that he was overburdened at work. Mr. Parker generally disputed appellant's contention that he had an overburdened workload. In a January 22, 2009 statement, he noted that in March 2008 appellant assumed the duties of a program manager and that all program managers' duties included the same tasks. Appellant's responsibilities were not unique and were similar to actions and deliverables for all similar employees. Mr. Parker expected each person to manage his workload with little or no supervision. He indicated that appellant had some difficulties in certain work areas but nevertheless continued to perform at the fully successful level. The Board finds insufficient evidence to support appellant's allegation that he was overworked. Thus, this factor has not been established.

Appellant made several allegations related to administrative and personnel actions. In *Thomas D. McEwen*,¹⁶ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing

¹³ See *Lillian Cutler*, *supra* note 3.

¹⁴ *Id.*

¹⁵ *Bobbie D. Daly*, 53 ECAB 691 (2002).

¹⁶ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁷

Appellant attributed stress, in part, to the work assigned to him by his supervisor. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.¹⁸ The Board notes that the assignment of work is an administrative function¹⁹ and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act. Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.²⁰ The Board finds that appellant has not offered sufficient evidence to establish error or abuse regarding his work assignments. The evidence does not establish that the employing establishment acted unreasonably. Mr. Parker noted that all program managers were assigned similar duties and all were expected to manage their workload with little or no supervision. He attempted to help appellant improve his performance and assigned three staff members to assist him. Appellant has presented no corroborating evidence to support that the employing establishment acted unreasonably in assigning work. He has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act.

Appellant also asserted that his work was unfairly assessed on November 18, 2008. Although the handling of performance assessments is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.²¹ The evidence is insufficient to establish that the employing establishment erred or acted abusively in this matter. Mr. Parker stated that appellant had some difficulty in certain job areas but that he continued to perform at the fully successful level. He discussed with appellant ways to improve his performance and assigned three staff members to assist him. Although appellant has made allegations that the employer erred in this administrative matter, he has not provided evidence to substantiate any such actions were in error or unreasonable. He has not established a compensable factor pertaining to his performance assessment.

As appellant established compensable factors of employment under *Cutler*, the Office must base its decision on an analysis of the medical evidence. The case will therefore be

¹⁷ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁸ See *Marguerite J. Toland*, 52 ECAB 294 (2001).

¹⁹ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

²⁰ See *Barbara J. Latham*, 53 ECAB 316 (2002); see also *Peter D. Butt Jr.*, 56 ECAB 117 (2004) (allegations such as improperly assigned work duties, which relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties do not fall within the coverage of the Act).

²¹ *C.S.*, 58 ECAB 137 (2006).

remanded to the Office for this purpose.²² After such further development as deemed necessary, the Office shall issue an appropriate decision on the merits of this claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2009 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: April 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²² *Tina D. Francis*, 56 ECAB 180 (2004).