

In reports dated June 12 and July 12, 2002, Dr. Bernardo Ng, an internist, diagnosed depressive disorder and advised that appellant was totally disabled until July 12, 2002.

By letter dated September 11, 2002, the Office requested that appellant submit additional information including a detailed description of the employment factors or incidents which he believed had contributed to his claimed illness and a comprehensive medical report from his treating physician, which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed emotional condition.

In a report dated October 8, 2002, Dr. Ng diagnosed depressive disorder and advised that the only external factor found to be associated with the presentation of appellant's symptoms was related to his work. He noted that the changes in appellant's position by the employing establishment were inappropriate and discriminatory. The physician advised that appellant was totally disabled from June 12 to July 12, 2002.

On October 11, 2002 appellant alleged that he had been subjected to ongoing discrimination and harassment by his peers and upper management since he assumed his position in March 1996. He alleged that on February 3, 2001 he was monitored during his shift to observe his interpersonal relations with the shift supervisors and bargaining unit members and was advised by Mario Lacuesta, his supervisor, that he would be "kept an eye on." Appellant alleged that on June 12, 2002 Mr. Lacuesta notified him that he was being reassigned to adjudication, which appellant believed was punishment and in retaliation for his previous complaints. Appellant alleged that on June 13, 2002 while attempting to present a disability slip to Mr. Lacuesta, he was yelled at in front of other employees regarding the insufficiency of the note. Appellant alleged that on June 13, 2002 Mr. Lacuesta improperly placed him on annual leave and absent without leave status instead of continuation of pay. Appellant submitted a copy of an Equal Employment Opportunity (EEO) Commission counseling report, which noted that no resolution was reached between appellant and the employing establishment.

Also submitted were memoranda from appellant to management dated September 24, 1999 to December 29, 2001, which detailed the incidents of alleged harassment by his supervisors. The September 24, 1999 memorandum was in response to management's inquiry as to why a cash register was not operational at the Valley Port of Entry and why appellant did not permit an employee to go to an interview. Appellant indicated that he was reluctant to let the employee leave his workstation because the employing establishment was minimally staffed and advised that the reason the cash register was not staffed was because the employee was at an interview. He alleged that the director responded to him in a loud voice when he offered the above explanation. On January 26, 2001 appellant was questioned regarding a rumor that an inspector and a supervisor were having an affair; however, appellant denied starting such a rumor. The January 31, 2001 memorandum noted that appellant was ordered by Mr. Lacuesta to make an agenda for the supervisor's retreat; however, appellant advised the director that he would not be attending the retreat. Mr. Lacuesta indicated that appellant was difficult and ordered him to attend the retreat and to prepare an agenda. On February 3, 2001 Mr. Lacuesta observed appellant during his shift to monitor his work with the shift supervisors and bargaining unit members and advised appellant that he would be "kept an eye on" by Mr. Lacuesta. On December 29, 2001 appellant advised that supervisor Francis Carrillo constantly belittled and

humiliated him in front of the staff and alleged an incident where he was chastised in front of the staff and told in a demanding loud voice that “I want to talk to you.”

In a decision dated July 23, 2003, the Office denied appellant’s claim on the grounds that the evidence of record failed to demonstrate that the claimed emotional condition occurred in the performance of duty.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.¹ 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*,² the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees’ Compensation Act.³ 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 under the Act.⁴ When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his 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 emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁵ 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 under the Act. 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. 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.⁶

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² 28 ECAB 125 (1976).

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁵ *Lillian Cutler*, *supra* note 2.

⁶ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *id.*

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.⁷ 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.⁸

ANALYSIS

Appellant alleged that he was subjected to discrimination and harassment by his peers and upper management after he assumed his position in March 1996. The Board, however, finds appellant's allegation that he worked in a hostile environment and was harassed by coworkers and management is not supported by the evidence of record. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁹ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁰ General allegations of harassment are not sufficient¹¹ and in this case appellant has not submitted sufficient evidence to establish that he was harassed by his supervisor.¹²

In memoranda dated September 24, 1999 to December 29, 2001, appellant alleged instances in which he was shouted at, monitored, called: "difficult," belittled and humiliated. Although appellant alleged that his supervisors and coworkers made statements, which he believed constituted harassment, he provided no supporting evidence such as witness statements to establish that the alleged statements actually were made or that the alleged conduct actually occurred.¹³ The Board notes that vague allegations of a supervisor berating and taunting appellant are insufficient to establish appellant's claim that he was harassed. A claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁸ *Id.*

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ See *Paul Trotman-Hall*, 45 ECAB 229 (1993).

¹² 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).

¹³ See *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

absent evidence that the interaction was, in fact, erroneous or abusive. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike actions taken.¹⁴ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant alleged that his work was erroneously monitored by supervisors. Although the monitoring of activities at work is generally related to the employment, it is an administrative function of the employer and not a duty of the employee. In *Thomas D. McEuen*,¹⁵ 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 establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁶ Appellant did not submit sufficient evidence to support his allegations that the employing establishment committed error or abuse in monitoring his work activities such that he did not establish a compensable employment factor.¹⁷

Appellant's other allegations of employment factors that caused or contributed to his condition also fall into the category of administrative or personnel actions. Appellant alleged that on June 12, 2002 his supervisor, Mr. Lacuesta, notified him that he was being reassigned to adjudication, which appellant believed was punishment and retaliation for his previous complaints. The Board has held that transfers are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹⁸ The Board finds that appellant has not shown that the employing establishment's actions in connection with the reassignment were unreasonable.¹⁹ The Board has recognized that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike actions taken.²⁰ Appellant did not submit evidence supporting his claims that the

¹⁴ See *Michael A. Deas*, 53 ECAB ____ (Docket No. 00-1090, issued November 14, 2001) (while the Board has recognized the compensability of threats in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to compensability). In this case, appellant did not submit evidence or witness statements in support of his allegation.

¹⁵ See *Thomas D. McEuen*, *supra* note 6.

¹⁶ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁷ See *Dennis J. Balogh*, 52 ECAB 232 (2001); see also *John Polito*, 50 ECAB 347 (1999).

¹⁸ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

¹⁹ See *Larry J. Thomas*, 44 ECAB 291, 300 (1992).

²⁰ *Michael A. Deas*, *supra* note 14.

employing establishment committed error or abuse. Appellant has presented insufficient evidence to support that the employing establishment erred or acted abusively with regard to these allegations and thus has not established administrative error or abuse.

Appellant alleged that Mr. Lacuesta wrongly denied continuation of pay and placed appellant on annual leave rather than continuation of pay. The Board, however, finds that, other than his general allegation, appellant has submitted no evidence that the employing establishment erred in that regard and notes that the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.²¹ Additionally, the Board notes that the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.²²

Appellant also indicated that he filed an EEO claim for harassment and discrimination. The Board, however, notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred²³ and in this instance, the EEO reported that no resolution had been reached. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.²⁴

²¹ See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

²² See *Judy Kahn*, 53 ECAB __ (Docket No. 00-457, issued February 1, 2002).

²³ *James E. Norris*, 52 ECAB 93 (2000).

²⁴ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member