

FACTUAL HISTORY

On May 9 and 24, 2002 the employee, then a 52-year-old career planning specialist, filed occupational disease claims alleging that she sustained an emotional condition in the performance of duty. She was first aware of the condition and its relationship to her employment on May 2, 2001. The employee stopped work on September 11, 2001 and returned on April 15, 2002. In an attached statement, she alleged that on May 2, 2001 her supervisor, Brian Eudailey, came into her office, shut the door and stood over her, yelling and pointing his finger at her with such force that she became traumatized. The employee alleged that her mid-year review was incorrect and that she was placed on a personal improvement plan (PIP) in retaliation and was generally harassed by Mr. Eudailey and her second-line supervisor, Barbara Saliunas, such that she had to reduce her volunteer work and Ph.D. studies. She alleged that she was inappropriately denied a requested transfer. The employee stated that she felt "abandoned" by the employing establishment while she was on leave from September 12, 2001 to April 15, 2002 and that her character had been attacked. She advised that she had submitted an Equal Employment Opportunity Commission (EEOC) claim. She also submitted diaries outlining disagreements with Mr. Eudailey from July 2 to 6 and 9 to 13, 2001, stating that he criticized her in front of a coworker, looked at her in a threatening manner and inappropriately criticized her writing.

Treatment notes from Harvey R. Oaklander, Ph.D., a clinical psychologist, dating from September 20 to December 4, 2001 were submitted to the record. He diagnosed post-traumatic stress disorder, which he stated was due to a series of incidents and emotional abuse by her supervisors and advised that she was totally disabled.

The record also contains a grievance filed on September 14, 2001 regarding a performance appraisal for the period July 1, 2000 to June 30, 2001 and a PIP issued on August 20, 2001.² A response to the grievance dated September 28, 2001, indicated that relief was not granted because there was no evidence of reprisal in issuing the PIP although the employee was removed from Mr. Eudailey's supervision.

In letters dated June 12, 2002, the Office informed the employee of the type evidence needed to support her claim and requested that the employing establishment respond to her allegations.

By response dated June 19, 2002, the employee reiterated that her condition was caused by the May 2, 2001 incident and being placed on a PIP. She was harassed by the employing establishment after she stopped work and noted that her grievance had been denied and that a final decision had not been issued regarding her EEOC claim. She also provided voluminous supporting materials, including a copy of the grievance with the employing establishment's denial, her EEOC complaint with accompanying notes and statements, a list of her 2001 achievements, an article she authored, a list of witnesses and her note regarding an October 30, 2001 telephone conversation. She also submitted reports dated January 22 and June 1, 2001

² The employee was placed on the PIP, prepared by Sheila M. Lumsden, because of her unacceptable performance for the rating period January 22 to June 30, 2001. She was rated unacceptable in critical elements of communication and special projects.

from Dr. Oaklander. In the latter report he opined that because of “all the abuses she suffered at work,” due to her fragile psychological make-up, the employee really believed her life was threatened.

The employee also submitted a number of unsigned witness interview notes by coworkers Teresa Keith, Brigitte Sizer, Carla Broddie, Mr. Eudailey, Ms. Saliunas and Sheila Lumsden, Chief Personnel Division, completed by an EEOC counselor.

On July 9, 2002 the employing establishment controverted the claim and provided an April 24, 2002 report in which Dr. Neil S. Hibler, Ph.D., noted his review of Dr. Oaklander’s records. Dr. Hibler diagnosed an hysterical personality disorder and advised that the employee would need a fitness-for-duty examination.

In a June 17, 2002 statement, Dennis A. Holley noted that he was the employee’s supervisor from July 16 to September 20, 2001. He stated that he did not have problems with her but that she had not liked either of her previous supervisors, Heide Hatten and Mr. Eudailey. Mr. Holley stated that the employee did not finish a handbook project previously assigned. In a June 28, 2002 statement, Ms. Saliunas, deputy chief, personnel division, noted that after a reorganization, on January 28, 2001 she became the employee’s second level supervisor. She stated that beginning in May 2001, the employee alleged that she was being exposed to workplace violence and a hostile environment created by Ms. Hatten and Mr. Eudailey. Ms. Saliunas noted that the employee and Mr. Eudailey had a difficult relationship but that an investigation found no wrongdoing. To accommodate the employee, Ms. Saliunas transferred the employee from Mr. Eudailey’s supervision. Ms. Saliunas agreed that the employee’s performance was unacceptable and warranted a PIP and further noted that, while the employee was off work, she continued her volunteer activities and returned to work on April 16, 2002.

In a July 1, 2002 statement, Mr. Eudailey, assistant special agent in charge, reported that he began working at the employing establishment in August 2000, when he first met the employee, but did not become her supervisor until December 2000. He stated that she was volatile and would violently disagree with her supervisors, thought she should be reimbursed for her volunteer work and wanted to be transferred to the National Threat Assessment Center, especially after the employing establishment was reorganized. Mr. Eudailey noted that the employee had a difficult relationship with Ms. Hatten, Ms. Lumsden, Ms. Saliunas and the previous chief, Joyce Soya and that she became “incensed” with a mid-year appraisal. He stated that she spent most of her day on personal and volunteer activities, overstepped her duties and would not follow the chain of command. The employee requested a desk audit, although one had been completed the previous year and they had a disagreement on April 25, 2001 regarding the allocation of training money. Mr. Eudailey explained that he went into her office to discuss three assignments with her and then asked her about comments she had made about him regarding the training funds.³ The employee became extremely agitated and jumped from her seat. Mr. Eudailey remained seated and told her to sit down because he had a point to make. He

³ Mr. Eudailey stated that he had jokingly told the employee that he would be using all the training funds himself, but reiterated to her that this was a joke. She thereafter told at least three employees that he would be using all the training funds himself and that he was questioned about this by Ms. Broddie on April 24, 2001. He then discussed this with the employee on April 25, 2001.

acknowledged that he did point a finger at her but stated that it was to indicate that she should sit down and was not done in a threatening manner. Mr. Eudailey told her that if she continued misquoting him, he would place a written reprimand in her file. He then left her office. Mr. Eudailey noted that he gave the employee a two-month deadline to complete an employee handbook and required weekly updates because she seemed to be accomplishing little, noting that she did not meet the April 27, 2001 deadline. He stated that he emailed her on May 2, 2001 regarding this and she became very upset.

On July 10, 2002 the employing establishment directed the employee to undergo fitness-for-duty examinations with Dr. Hibler and Dr. Martin Allen, a Board-certified psychiatrist. In a report dated July 31, 2002, Dr. Hibler noted that the employee repeated her allegations regarding employing establishment personnel and provided him with a number of documents. She exhibited essentially normal cognitive functioning and did not have post-traumatic stress disorder. Dr. Hibler diagnosed an adjustment disorder with anxiety, panic disorder by history and an underlying personality disorder. He provided test results and found her fit for duty. By report dated August 1, 2002, Dr. Allen noted the employee's complaints concerning her treatment at the employing establishment and her history of volunteer work. He diagnosed an adjustment disorder with anxiety, panic disorder by history and a personality disorder with histrionic, narcissistic and obsessive compulsive features. He concluded that she was fit for duty as a career planning specialist but needed medication. In an August 9, 2002 report, Dr. Hibler noted the employee's inappropriate behavior on the date of his examination, advising that she had boundary problems. On August 12, 2002 an employing establishment physician, Dr. Richard J. Miller, found the employee fit for duty and advised that she should continue with psychotherapy and take medication.

In a report dated December 11, 2002, Dr. Bryant L. Welch, J.D., Ph.D., noted that he had examined the employee for a disability retirement application and opined that she experienced a severe psychiatric illness.⁴ His review of the medical record noted the employee's work absence began on September 12, 2001 rather than May 2001 when she stated the abuse began. He agreed with Dr. Hibler that she had a boundary problem and noted that there was disagreement in the psychiatric community regarding whether the triggering event for post-traumatic stress disorder had to be life threatening or merely perceived as such, noting that September 11, 2001 was a life threatening event for the employee. Dr. Welch also diagnosed anxiety with panic, depression and a personality disorder. He speculated that the employee could have an underlying organic impairment and advised that she could not work.

By decision dated March 19, 2003, the Office denied the claim, finding that the employee failed to establish a compensable factor of employment and her condition did not arise in the performance of duty. On April 4, 2003, through her attorney, she requested a hearing. The employee died on February 25, 2004 and the request was changed to a request for a review of the written record. In a decision dated August 13, 2004, an Office hearing representative affirmed the March 19, 2003 decision.

⁴ On November 25, 2002 the Office of Personnel Management denied the employee's application for disability retirement and denied her request for reconsideration on January 27, 2003.

LEGAL PRECEDENT

To establish a claim for an emotional condition sustained 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.⁵

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*,⁶ 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.⁷ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁸ 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 a emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁹ 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 frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁰

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.¹¹ An administrative or personnel matter will be considered to be an employment factor, however, where the evidence discloses error or abuse on the part of the employing establishment.¹²

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

⁵ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁶ 28 ECAB 125 (1976).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁹ *Lillian Cutler*, *supra* note 6.

¹⁰ *Kim Nguyen*, 53 ECAB 127 (2001).

¹¹ *Felix Flecha*, 52 ECAB 268 (2001).

¹² *James E. Norris*, 52 ECAB 93 (2000).

employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹³

ANALYSIS

In this case, the employee described a number of employment conditions which she believed caused her emotional condition and contended that she was harassed by her supervisors, particularly Mr. Eudailey, Ms. Saliunas and Ms. Hatten. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.¹⁴ The Board finds that appellant has failed to establish that these were compensable factors of employment.

Regarding her request for a transfer, an employee's frustration over not being permitted to work a particular shift or to hold a particular position is not covered under the Act.¹⁵ The mere fact that the employee was transferred from Mr. Eudailey's supervision, does not, in and of itself, establish error or abuse by management in its administrative duties.¹⁶ Ms. Saliunas indicated that this was done to accommodate the employee and the record does not evidence wrongdoing on the part of Mr. Eudailey. The mere transfer of supervisors is not evidence that the employing establishment committed error or abuse in this regard.¹⁷

Regarding her performance appraisal and being placed on a PIP, these too fall into the category of administrative or personnel actions and absent a showing of error or abuse, these matters generally fall outside the scope of coverage under the Act.¹⁸ In this case, there is no evidence of record to indicate that the employing establishment erred or was abusive in these matters. Ms. Saliunas and Mr. Eudailey provided ample explanations regarding the reasons for their issuance. The Board finds no evidence of error or abuse in the employee's performance appraisal or in placing her on a PIP. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act. This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties, that employees will at times dislike the actions taken.¹⁹ Furthermore, mere disagreement or dislike of a supervisory or management action will not be compensable without

¹³ *Id.*

¹⁴ *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002).

¹⁵ *Kim Nguyen*, *supra* note 10.

¹⁶ *See e.g. Peter D. Butt, Jr.*, 56 ECAB ____ (Docket No. 04-1255, issued October 13, 2004).

¹⁷ *See Felix Flecha*, *supra* note 11.

¹⁸ *Id.*

¹⁹ *Judy L. Kahn*, 53 ECAB 321 (2002).

a showing through supporting evidence that the incidents or actions complained of were unreasonable.²⁰ While the employee was unhappy with actions and decisions made by her supervisors, there is insufficient evidence of record to establish that these actions were unreasonable or otherwise abusive.

The employee alleged that a confrontation with Mr. Eudailey on May 2, 2001 constituted verbal abuse. The Board has recognized the compensability of verbal abuse in certain circumstances. This, however, does not imply that every statement uttered in the workplace will give rise to compensability,²¹ a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.²² The record indicates that the employee and Mr. Eudailey had a difficult working relationship and that they had disagreements.²³ The record notes that Mr. Eudailey asked appellant to remain seated and pointed a finger at her. While the employee submitted an EEOC investigative report which included interviews with coworkers, the Board finds these to be of limited probative value as they are general in nature and do not provide specific descriptions of this or any other incident or dates upon which these alleged incidents occurred. There is insufficient evidence to find verbal abuse or threatening conduct on the part of Mr. Eudailey. The Board finds that this event does not constitute a compensable factor as the employee did not show how it rose to the level of verbal abuse or otherwise fall within the coverage of the Act.²⁴

The employee also stated that a grievance and an EEOC complaint had been filed. In assessing the evidence, the Board has held that grievances and EEOC complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.²⁵ In this case, the grievance was denied and the record does not contain a final EEOC decision. The findings of other administrative agencies, while instructive, are not determinative in proceedings under the Act, which is administered by the Office and the Board.²⁶ The employee failed to establish a compensable factor of employment in this regard.

She also alleged harassment by Mr. Eudailey, Ms. Saliunas, Ms. Hatten and Ms. Lumsden. With regard to emotional claims arising under the Act, the term “harassment” as applied by the Board is not the equivalent of “harassment” as defined or implemented by other agencies, such as the EEOC, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers’ compensation under the Act, the term “harassment” is synonymous, as generally defined, with a persistent disturbance,

²⁰ *Id.*

²¹ *Denise Y. McCollum*, 53 ECAB 647 (2002).

²² *Penelope C. Owens*, 54 ECAB ____ (Docket No. 03-1078, issued July 7, 2003).

²³ The Board notes that he stated that the incident occurred in April 2001, rather than the May 2001 date provided by the employee.

²⁴ *See Peter D. Butt, Jr.*, *supra* note 16.

²⁵ *Michael L. Deas*, 53 ECAB 208 (2001).

²⁶ *James E. Norris*, *supra* note 12.

torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions of harassment or discrimination are not compensable under the Act²⁷ and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.²⁸ In the case at hand, other than the unsigned interview statements described above, the employee has provided no evidence to substantiate that she was harassed. The Board finds that her allegations are not substantiated and must be found to constitute her perceptions. She did not establish as factual a basis for her perceptions of discrimination or harassment by employing establishment personnel or that harassment and/or discrimination occurred.²⁹ The evidence instead suggests that the employee's feelings were self-generated and thus not compensable under the Act.³⁰ The employee failed to establish a compensable employment factor, the Office properly denied her claim without addressing the medical evidence of record.³¹

CONCLUSION

The Board finds that the employee failed to meet her burden of proof to establish that the employee sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

²⁷ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

²⁸ *James E. Norris*, *supra* note 12.

²⁹ *Id.*

³⁰ *See Gregorio E. Conde*, 52 ECAB 410 (2001).

³¹ *Garry M. Carlo*, 47 ECAB 299 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 13, 2004 be affirmed.

Issued: October 14, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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