United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 05-1029**
	)	**Issued: August 29, 2006**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INDIANAPOLIS DISTRICT OFFICE, Indianapolis, IN, Employer	)	

Appearances:
D.M., pro se
Thomas G. Giblin, Esq., for the Director

Oral Argument July 20, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 4, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 17, 2005 which denied modification of the decision denying his claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

This is the third appeal in the present case. In a November 14, 2002 decision, the Board affirmed the Office's decisions dated June 26 and October 16, 2001 and July 3, 2002.[1] The Board found that appellant did not establish that he developed an emotional condition in the

[1] Docket No. 02-317 (issued November 14, 2002).

performance of duty as he had not established any claimed employment factors.[2] Thereafter, on November 29, 2002, appellant again appealed to the Board. In an order dated May 8, 2003, the Board dismissed appellant's appeal on the grounds that there was no decision over which the Board had jurisdiction.[3] On May 9, 2003 the Board, on a petition for reconsideration, modified the prior decision of November 14, 2002 to reflect that it did not have jurisdiction to review the Office's July 3, 2002 hearing representative's decision. The Board also denied appellant's request for reconsideration.[4] The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and incorporated herein by reference.

Following the Office's October 16, 2001 decision an oral hearing was held on April 30, 2002. Appellant submitted several exhibits in support of his claim including a letter dated June 1, 2000 from a claimant thanking him for agreeing to a settlement conference by telephone, an email dated June 18, 2000 from Tammy Whitaker which referenced an attached memorandum identifying cases assigned to appellant, and a request for compensatory time for August 2, 2000 prepared by appellant and an attached email from Laura Young, his supervisor, requesting an additional explanation in support of his request for compensatory time. Also submitted was an email from Julie Christophersen to appellant dated August 18, 2000 inquiring as to his work schedule. Appellant submitted a statement from Andrew Sheppard, former director of the employing establishment, dated May 13, 2001, noting that appellant was a good employee. He submitted several documents which noted format changes to documents prepared by him. An undated email from appellant to Ms. Whitaker noted that he was concerned with the numerous emails she was sending him while a memorandum from Ms. Whitaker to appellant requested changes to a conference report he prepared. Also submitted were reports from Dr. John Gilkey, Board-certified in psychiatry and neurology, dated December 8, 2000 to March 27, 2002, who noted treating appellant for depression and anxiety due to his workplace. Appellant submitted an interim evaluation dated October 1, 2001 to March 31, 2002 noting that appellant was performing well. An October 18, 2001 appraisal noted that he received an outstanding rating. In an excerpt from an Equal Employment Opportunity (EEO) Commission investigative report, Ms. Young expressed concerns over the quality of appellant's work to James Neeley, director of the Detroit office.

In a decision dated July 3, 2003, the hearing representative affirmed the decision of the Office dated June 26, 2001.

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[2] Appellant submitted a statement and alleged that he was harassed and discriminated against by his supervisors and that there was a conspiracy between the managers to prevent him from transferring to Detroit. He further alleged that the main cause of his condition was his agencies' continuous refusal to grant him a hardship transfer from his permanent workstation in Memphis to the Detroit office so that he could take care of his sick daughter. Appellant alleged that his supervisors inappropriately discussed the quality of his work with other supervisors and subordinates, failed to give him credit for case closures, returned his work for format and stylistic changes and bombarded him with emails. He alleged that his supervisors improperly watched and monitored him. Appellant alleged that he was wrongfully denied advanced sick leave and required to produce additional documentation to support his request for compensatory time.

[3] Docket No. 02-2121 (issued May 8, 2003).

[4] Docket No. 02-317 (issued May 9, 2003).

On December 5, 2003 appellant filed a request for reconsideration. In a decision dated March 15, 2004, the Office denied modification of its prior decision.

On December 29, 2004 appellant requested reconsideration. Appellant submitted a memorandum dated October 14, 1994 from the district director noting that appellant was the recipient of the director's award. Also submitted was a certificate of achievement dated May 10, 1995 and an email noting that appellant was employee of the month for January 1998. Appellant submitted performance ratings dated November 12, 1997, November 23, 1998 and November 22, 1999, which noted that appellant was proficient. He submitted a memorandum from Dan Dushman, a coworker, dated September 2, 1999, requesting a hardship transfer to the Detroit office. Also submitted was an unsigned performance appraisal for October 1, 2000 to September 30, 2001 that rated appellant outstanding. Appellant submitted an excerpt of a deposition, in a federal court case, dated June 3, 2003 of Gail Cober in which Ms. Cober opined that appellant's case closure rate was higher than his coworker, Mr. Dushman.

By decision dated February 17, 2005, the Office denied modification of the decision dated March 15, 2004.

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 Federal Employees' Compensation Act.[5] 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]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by employment factors.[7] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.[8]

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

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[8] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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.[9] 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.[10]

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.[11] 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.[12]

ANALYSIS

In its November 14, 2002 decision, the Board considered appellant's allegations, made in connection with his November 2000 claim, that he was harassed and discriminated against by his supervisors and that there was a conspiracy between the managers to prevent him from transferring to Detroit. Appellant alleged that the main cause of his condition was his agency's continuous refusal to grant him a transfer from his permanent workstation in Memphis to Detroit so that he could attend to his sick daughter. He alleged that his supervisors inappropriately discussed his work with other supervisors and subordinates, failed to give him credit for case closures, returned his work for format and stylistic changes and bombarded him with emails. The Board found that appellant had not established any claimed employment factors and therefore failed to establish that he developed an emotional condition in the performance of duty.

Subsequent to that decision of the Board, appellant submitted additional evidence and argument to the Office generally asserting that he was discriminated against and harassed. He stated that other employees had been transferred because of family hardships and his transfer request was denied because of his race and gender. Appellant also alleged that there was a conspiracy against him between the managers in different offices to keep him from transferring to Detroit.

It is a well-established principle that, for harassment, discrimination or retaliation to give rise to a compensable disability under the Act, there must be some evidence that the implicated incidents of harassment, discrimination or retaliation did, in fact, occur. Mere perceptions of harassment, discrimination or retaliation are not compensable.[13] An employee's allegations that

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

[10] *Id.*

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

[12] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[13] *Helen Casillas*, 46 ECAB 419 (1995).

he or she was harassed or discriminated or retaliated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.[14] Such incidents and allegations may rise to the level of compensable harassment if they are established to have occurred.

The factual evidence fails to support appellant's claim regarding harassment. Supporting his December 5, 2003 and December 29, 2004 reconsideration requests, appellant submitted a September 2, 1999 memorandum from Mr. Dushman requesting a hardship transfer to the Detroit office of the employing establishment. Appellant also submitted an excerpt of a deposition dated June 3, 2003 of Ms. Cober who opined that appellant's case closure rate was higher than Mr. Dushman. He submitted numerous performance appraisals indicating proficiency and outstanding performance and awards from the period 1994 to 2001. However, appellant did not cite any specific examples of discrimination or harassment regarding his request to transfer to Detroit or regarding the alleged conspiracy. The fact that Mr. Dushman requested a hardship transfer is of no consequence in appellant's claim as Mr. Dushman transfer request was for a different position than that of appellant as he was a senior investigator not an administrative law judge. Additionally, it is also unclear from the record whether Mr. Dushman's transfer was granted. Likewise, the deposition excerpt from Ms. Cober is of little probative value to appellant's claim for harassment and discrimination as she does not address Mr. Dushman's transfer request or the facts surrounding the transfer. The memorandum, deposition excerpt, and performance appraisals, therefore, are of little probative value in establishing that any events regarding discrimination or harassment actually occurred. The Board finds that appellant has failed to submit probative and reliable evidence to establish that his supervisors discriminated or conspired against him in his efforts to transfer to Detroit.

Appellant's other allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. The Board has 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.[15] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[16]

Appellant has not alleged that his disability resulted from an emotional reaction to his regular or specially assigned work duties or to a requirement imposed by his employment. He

[14] *Anthony A. Zarcone*, 44 ECAB 751 (1993).

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

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

alleged that the main cause of his emotional condition was his agency's continuous refusal to grant him a hardship transfer to Detroit.

The Board has found that a disability is not compensable where it results from appellant's frustration from not being able to work in a particular environment or to hold a particular position.[17] Appellant's desire to work in the Detroit office is an administrative matter and is not a compensable factor under the Act.[18] The Board also notes that appellant's reason for wanting to transfer to a different office is personal in nature and is irrelevant to the case at hand. With regard to whether the employing establishment erred or acted abusively in the administration of a personnel matter, the evidence submitted by appellant does not show that the agency erred or abused its discretion in denying his transfer to Detroit. The record contains letters from the agency to appellant citing their reasons for the denial of the transfer such as budgetary and staffing concerns. For example, on February 3, 1998, the employing establishment stated that due to workload and staffing needs in Memphis, it was unable to grant his request for reassignment. It indicated that it would reconsider his transfer request if the workload and staffing situation changed. Appellant has submitted no evidence to suggest that his agency acted abusively in denying his requests to transfer to Detroit. On the contrary, the agency cited valid reasons such as workload, staffing needs and budget as reasons for the denial. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant alleged that his supervisor attempted to slow his job performance in order to make him ineligible for a transfer to Detroit. He stated that he was not given appropriate credit for case closures, his work was returned for format and stylistic changes, he was bombarded with email, he was closely watched and monitored and questioned, and his supervisor improperly discussed the quality of his work with others and questioned his work hours.

An employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which supervisors exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his duties and that employees will at times dislike actions taken.[19] Furthermore, the Board has held that discussions of job performance, monitoring and assignment of work are administrative functions that do not fall under the coverage of the Act absent a showing of error or abuse.[20]

However, appellant has not established that the employing establishment acted unreasonably with regard to these administrative matters. With his December 5, 2003 and December 29, 2004 reconsideration requests, appellant submitted numerous examples of work product returned to him by his supervisor for stylistic and/or grammatical changes. These

[17] *See Lillian Cutler*, *supra* note 6.

[18] *See Ernest J. Malagrida*, 51 ECAB 287 (2000).

[19] *Linda J. Edwards-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004).

[20] *See Donney T. Drennon-Gala*, 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

documents alone do not support the contention that his supervisor was unreasonable in requesting his work to be submitted in a particular format or style. Appellant also did not submit evidence indicating that he was not given appropriate credit for case closures, nor did he submit evidence showing that the manner in which his supervisor gave him credit for his completed cases was unreasonable. While he submitted copies of numerous emails and alleged that he was "bombarded" with these messages, the emails only support the fact that his supervisor communicated with him through email and there is no evidence to support that this method of communication was unreasonable. In addition, appellant never stated exactly how many emails were sent to him, nor did he explain how these emails were abusive or unreasonable. In conjunction with his December 5, 2003 and December 29, 2004 reconsideration requests, appellant also submitted an excerpt from an EEO Commission investigative report in which Ms. Young expressed concerns over the quality of appellant's work to Mr. Neeley. However, as noted above, the Board has held that discussions of job performance do not fall under the coverage of the Act absent a showing of error or abuse.[21] There is no evidence that appellant's supervisor abused her discretion or was unreasonable in discussing appellant's performance with another supervisor. Regarding allegations that his supervisor improperly watched and monitored him, appellant submitted no evidence showing that the way in which his supervisor monitored and watched him was abusive or unreasonable. Instead, evidence submitted by appellant demonstrates that his work was monitored but it does not suggest that any such monitoring was unreasonable.

Lastly, appellant alleged that he was wrongfully denied leave and required him to produce additional documentation to support his request for compensatory time. 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] In conjunction with his December 5, 2003 and December 29, 2004 reconsideration requests, appellant submitted a request for compensatory time for August 2, 2000 prepared by him and an attached email from Ms. Young, appellant's supervisor, requesting an additional explanation in support of his request for compensatory time. He noted that Ms. Whitaker, who also used compensatory time on this day, was not asked to provide additional explanation. Also submitted was an email from Ms. Christophersen to appellant dated August 18, 2000 inquiring as to his work schedule. There is no evidence that appellant's supervisor erred or acted unreasonably in requesting an additional explanation for his use of compensatory time on the day in question and appellant has presented no corroborating evidence from Ms. Whitaker or others to support that the employing establishment erred in this matter. The Board finds that the employing establishment acted reasonably in this administrative matter and appellant has not established a compensable factor of employment with respect to this allegation.

[21] *See Donald E. Ewals*, 51 ECAB 428 (2000).

[22] *See Judy Kahn*, 53 ECAB 321 (2002).

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.[23]

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[23] 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).