

attributed his condition to intimidation and physical threats by his supervisor and remarks by coworkers.

On July 27, 2007 the Office informed appellant that the evidence was insufficient to support his claim. Appellant was advised as to the type of medical and factual information required to support his claim.

Appellant submitted an August 6, 2005 grievance claim for an incident occurring on August 5, 2005. The August 6, 2005 grievance alleged that on August 5, 2005 Erine Banks, appellant's supervisor, threatened him. He noted that he was a diabetic and that he felt his sugar level dropping when he returned from picking up chicken dinners for the employee appreciation. At this point, and prior to returning to the employing establishment, appellant stated that he stopped to eat a portion of a chicken dinner to bring up his sugar level. He stated that he informed a coworker about his blood sugar level when Mr. Banks began to question him about the delivery of the dinners. Appellant informed Mr. Banks of his low blood sugar and asked if someone else could deliver the remaining chicken dinners as he needed to rest. Mr. Banks refused appellant's request and directed him to deliver the remaining meals. At this point, Mr. Banks allegedly threatened appellant by stating that if appellant had something to say, they could take it outside and appellant would lose. Robert Mayfield and Bob Klein certified that they witnessed the incident with Mr. Banks and appellant on August 5, 2005 as described by appellant.

Appellant alleged that on March 30, 2006 Mr. Banks informed him that he was issuing two counseling letters for two incidents reported by Mary Castillion, a coworker. The first incident involved money Ms. Castillion received while covering for appellant during his lunch break. Mr. Banks informed appellant that the cash register receipt did not include a \$2.00 guest fee Ms. Castillion received. Appellant noted that Ms. Castillion informed him of the two cash sales she received while covering for him. However, appellant argued that it was Ms. Castillion's responsibility to log in the cash sales and that she should have been counseled. The second incident occurred when Ms. Castillion reported that she arrived at work on March 27, 2006 and noted appellant talking to another individual in the parking lot. She related that there were people who appeared to be in need of assistance at the front of the fitness center. Appellant contended that Ms. Castillion could have called to him and told him that there were customers requiring his assistance instead of telling Mr. Banks. He noted that he was on his 15-minute break during the period that Ms. Castillion stated that he was outside.

On June 5, 2006 Dr. Janice S. Glenn, a Board-certified family practitioner, indicated that she had treated appellant since 1993 and that since 1999 he had been insulin dependent. She related that appellant is "prone to episodes of dangerously low blood sugar" and that he needed to be able to eat when he feels his blood sugar level has dropped. Dr. Glenn noted that appellant developed restless leg syndrome and sleep apnea when his work hours changed to 5:00 a.m. to 1:30 p.m. She opined that this change in appellant's working hours "caused severe problems with his diabetes control" and contributed to his stress level, which was already high due to an ongoing pattern of harassment over the years as reported by appellant.

The employing establishment submitted statements by appellant's first and second line supervisor responding to his allegations. In an August 14, 2006 statement, Pam Menesses,

community activities manager, stated that she was Mr. Banks' immediate supervisor. She was unaware of any incident or situation in which appellant had been the victim of any job-related stress. Ms. Menesses stated that she contacted the union president, Malcolm Skeins, who informed her that appellant may have filed a grievance but he did not remember. She related that appellant's hours were changed after reviewing medical evidence that he submitted in support of his compensation claim.

On August 14, 2006 Mr. Banks responded to appellant's allegations. He denied that he threatened appellant on August 5, 2005 and that he never received a copy of the report or grievance filed by appellant. Mr. Bank also denied appellant's allegations that coworkers were spying on him. He stated that coworkers expressed their concerns as to why appellant had a negative attitude about the job and was not acting as a team player. With respect to appellant's allegation of using "many hours of sick and annual leave to seek medical attention," Mr. Banks noted that appellant was assigned the early shift and could have easily scheduled medical appointments after his shift ended. Mr. Banks stated that he was attending a meeting and that upon returning he learned that appellant was not feeling well. He stated that he then drove appellant home in a government vehicle.

In response to the questions from the Office, appellant detailed various incidents he believed contributed to his stress. Appellant repeated the August 5, 2005 incident described in his grievance and noted Mr. Mayfield and Mr. Klein as witnesses. On February 8, 2006 D. Scott, a coworker, told appellant that they were watching him. After hearing this, appellant noticed coworkers looking at him, then turn away when they saw him looking back. He reported seeing a note pad on Ms. Castillion's desk which contained "a listing of dates and times [he] went to lunch and returned, when [he] went on breaks and returned and other movements." On May 4, 2005 appellant described an incident involving Ms. Castillion looking down at him while he was sweeping the gym weight area. He stated that he became paranoid as a result of employees observing me. Appellant related that on March 2, 2006 at about 10:30 a.m. he developed a migraine headache and he then called Mr. Banks to request leave. At 11:00 a.m., Mr. Banks arrived and allegedly told the chief steward, who had mentioned that appellant looked unwell, that he was in charge. Appellant stated that he went out to his car and fell asleep. At 12:15 p.m. Mr. Banks found him and informed appellant that he would be driven home. The March 30, 2006 counseling session with Mr. Banks involved the two incidents reported by Ms. Castillion. On July 27, 2006 appellant stated that he was rated "A" on his performance evaluation by Mr. Banks, who then presented appellant with two more counseling documents immediately following his performance appraisal and ignored his right to have a union representative present. One of the incidents for which appellant was counseled involved sleeping at the front counter. He noted that he was being treated for sleep apnea and had presented medical documentation showing that he developed this condition due to stress at his workplace. Appellant alleged that he was subjected to emotional duress and physical threats. He alleged that he was unable to perform the duties of the position to which he was assigned as he had lifting restrictions limited to 15 pounds. Appellant noted that the position required he be able to perform cardiopulmonary resuscitation (CPR), which he was not qualified to perform.

In a September 1, 2006 counseling documentation form, Mr. Banks counseled appellant for calling one hour past the start of his work shift to abuse that he would not be at work.

By decision dated November 30, 2006, the Office denied appellant's emotional condition claim.

In a letter dated January 30, 2007, appellant requested reconsideration and stated that he was enclosing statements dated December 21, 2006 by two coworkers and an appeal request form in support of his request. No attachments were submitted with appellant's request.

On February 28, 2007 the Office denied appellant's request for reconsideration.¹ The Office found that while appellant's letter referenced attachments to his letter, a review of the record disclosed no attachments were submitted with his letter.

LEGAL PRECEDENT -- ISSUE 1

To establish his claim that he sustained an emotional condition in the performance of duty, a claimant 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.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 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.⁴ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁵ When an employee experiences emotional stress in carrying out his 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 an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁶ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a

¹ The Board notes that appellant has submitted new evidence with his appeal to the Board. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB ____ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

² *Leslie C. Moore*, 52 ECAB 132 (2000).

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁶ *Lillian Cutler*, *supra* note 3.

reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

In emotional condition claims, 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. 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

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.⁹ An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹⁰ An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.¹¹ Similarly, an employee's dissatisfaction with perceived poor management is not compensable under the Act.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 employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. 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 allegations with probative and reliable evidence.¹³

ANALYSIS -- ISSUE 1

Appellant alleged that he was subjected daily to emotional duress and physical threats. Specifically, he alleged that Mr. Banks threatened and harassed him on various dates. Appellant

⁷ *Kim Nguyen*, 53 ECAB 127 (2001).

⁸ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁹ *Felix Flecha*, 52 ECAB 268 (2001).

¹⁰ *See supra* note 7.

¹¹ *Barbara J. Latham*, 53 ECAB 316 (2002).

¹² *Id.*

¹³ *James E. Norris*, 52 ECAB 93 (2000).

also alleged that Mr. Banks improperly counseled him and that he was being observed by coworkers who kept track of his comings and goings.

Appellant contended that he was unable to perform the duties of his position as he was not qualified in CPR and was unable to lift more than 15 pounds. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity is substantiated by the record.¹⁴ However, there is insufficient evidence to establish that the employing establishment required appellant to perform work that exceeded his medical restrictions or that he was required to perform CPR. Appellant did not demonstrate that his supervisor required him to work beyond his restrictions by requiring him to lift more than 15 pounds. The evidence establishes that he was required to help customers at the fitness center, get chicken dinners for employee appreciation and sweep the floor. Appellant did not provide evidence showing that he was required to work outside his restrictions. Therefore, this allegation is not found to be a compensable employment factor.

Appellant has not established that the employing establishment acted unreasonably with regard to administrative matters. He alleged that he was improperly monitored by coworkers and issued unreasonable counseling actions. Appellant submitted no evidence showing that these administrative functions were abusive or unreasonable. He alleged that Mr. Banks inappropriately counseled him following his performance appraisal in 2004. However, as noted the Board has held that discussions of job performance and counseling do not fall under the coverage of the Act absent a showing of error or abuse. There is no evidence that appellant's supervisor abused his discretion or was unreasonable in either monitoring appellant on October 2, 2004 or discussing his performance of October 2, 2004 with appellant. He has failed to establish compensable work factors with respect to these allegations.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute a compensable employment factor.¹⁵ However, for harassment and discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.¹⁶ Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁷

Appellant alleged that coworkers were watching him. He reported that, on February 8, 2006, D. Scott, a coworker, told him that they were watching him. On May 4, 2005 appellant observed Ms. Castillion looking down at him while he was sweeping the gym weight area. He

¹⁴ *D.L.*, 58 ECAB ____ (Docket No. 06-2018, issued December 12, 2006).

¹⁵ *See Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁶ *See V.W.*, 58 ECAB ____ (Docket No. 07-234, issued March 22, 2007); *C.S.*, 58 ECAB ____ (Docket No. 06-1583, issued November 6, 2006); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

¹⁷ *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006); *Donna J. DiBernardo*, 47 ECAB 700 (1996).

alleged that he became paranoid as a result of unidentified individuals observing him. Appellant's allegations alone are insufficient to establish a factual basis for his claim.¹⁸ He has submitted no evidence, such as witness statements, to corroborate his claims. General allegations that he was being watched by coworkers are insufficient to establish that harassment did, in fact, occur. Thus, the Board finds that appellant has not established a compensable employment factor under the Act with respect to these above-described allegations.

Appellant also alleged that he was threatened and harassed by Mr. Banks. On August 5, 2004 Mr. Banks allegedly threatened him after picking up chicken dinners for an employee appreciation. Appellant informed Mr. Banks of his low blood sugar level and requested that someone else complete the delivery of the chicken dinners. Mr. Banks refused the request and ordered appellant to complete the delivery of the dinners. It was at this point that Mr. Banks allegedly threatened appellant. Appellant also alleged harassment on March 2, 2006. He alleged that around 10:30 a.m. on that date he developed a migraine headache and called Mr. Banks to request leave. As appellant had no response from Mr. Banks, he stated that he went out to his car and fell asleep. Mr. Banks found him at 12:15 p.m. and informed him that he would be taken home in a government vehicle.

As to the August 5, 2005 incident, the employing establishment submitted statements dated August 14, 2006 by Ms. Menesses and Mr. Banks, denying appellant's allegation that Mr. Banks threatened Ms. Menesses related that she was unaware "of any incident or situation in which [appellant] has been the victim of any job[-]related stress." Mr. Banks denied that he threatened appellant on August 5, 2005. As to the March 2, 2006 incident, he stated that he was attending a meeting and he learned that appellant was not feeling well. Mr. Banks stated that he drove appellant home in a government vehicle. The evidence of record does not establish appellant's allegations as factual. The employment incidents alleged as the cause of his emotional condition were not supported by probative and reliable evidence, such as witness statements. Appellant submitted evidence of an August 5, 2005 grievance detailing the August 5, 2005 incident with Mr. Banks. On the second page of the form there were witness signatures of Mr. Mayfield and Mr. Klein. Above the signatures, was a statement that both Mr. Mayfield and Mr. Klein witnessed the incident with Mr. Banks and appellant on August 5, 2005 as described by appellant. However, they provided no independent statement explaining what happened. To establish that an incident occurred as alleged, the evidence must be sufficiently specific as to person, time and place.¹⁹ The evidence from the claim form is not sufficient to establish that appellant was harassed or verbally abused by his supervisor. With respect to the other March 2, 2006 incident, he submitted no witness statements. There is insufficient evidence to establish his allegations as factual and they are not compensable employment factors.

Appellant alleged that on March 30, 2006, his supervisor improperly issued two counseling letters involving the incidents described by Ms. Castillion. The first incident involved Ms. Castillion covering for appellant during his lunch hour. Mr. Banks admonished appellant for failing to include a cash register receipt for \$2.00 that Ms. Castillion received while

¹⁸ *Charles E. McAndrews*, 55 ECAB 711 (2004).

¹⁹ *See Mildred D. Thomas*, 42 ECAB 888 (1991); *David W. Shirey*, 42 ECAB 783 (1991).

covering for him. On March 27, 2006 Ms. Castillion arrived and noticed appellant talking with another individual in the parking lot. She reported that she provided assistance to people waiting at the front of the fitness center. Appellant stated that Ms. Castillion should have told him that there were customers requiring his assistance instead of telling Mr. Banks. On July 26, 2006 he alleged that Mr. Banks improperly issued two more counseling letters following his performance evaluation. Appellant contended that Mr. Banks should have told him of the problem on July 11, 2006, when the incidents occurred, instead of waiting until his performance evaluation. One counseling letter involved his sleeping at the front counter and he informed management that he was being treated for sleep apnea. These allegations relate to administrative or personnel matters, not to the employee's regular or specially-assigned work duties and does not fall within the coverage of the Act.²⁰ Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.²¹ An administrative or personnel matter will not be considered to be an employment factor unless the evidence discloses error or abuse on the part of the employing establishment or that it acted unreasonably. The evidence in this case is insufficient to establish that Mr. Banks erred or acted abusively in these matters. Although appellant alleged stress with respect to Mr. Banks issuing the counseling letters, he has not provided evidence to substantiate that any actions taken by Mr. Banks were in error, abusive or unreasonable in nature. He has not established a compensable factor pertaining to the issuance of disciplinary actions.

Appellant failed to establish that his emotional condition was causally related to a compensable factor of employment. Therefore, the Office properly denied his claim.²²

LEGAL PRECEDENT -- ISSUE 2

The Act²³ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.²⁴ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.²⁵

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

²⁰ *Robert Breeden*, 57 ECAB ____ (Docket No. 06-734, issued June 16, 2006).

²¹ *V.W.*, 58 ECAB ____ (Docket No. 07-234, issued March 22, 2007).

²² Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. See *Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006); see *Barbara J. Latham supra* note 11; *Garry M. Carlo*, 47 ECAB 299 (1996).

²³ 5 U.S.C. §§ 8101 *et seq.*

²⁴ 5 U.S.C. § 8128(a). See *Tina M. Parrelli-Ball*, 57 ECAB ____ (Docket No. 06-121, issued June 6, 2006).

²⁵ 20 C.F.R. § 10.605.

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.²⁶

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.²⁷ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²⁸

ANALYSIS -- ISSUE 2

Appellant's January 30, 2006 request for reconsideration was not accompanied by any new evidence and it did not argue that the Office erroneously applied or interpreted a specific point of law. The Office noted that while appellant referenced six enclosures to his letter requesting reconsideration, a review of the record failed to find the referenced enclosures.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his January 30, 2007 request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁶ *Id.* at § 10.606. See *Susan A. Filkins*, 57 ECAB ____ (Docket No. 06-868, issued June 16, 2006).

²⁷ *Id.* at § 10.607(a). See *Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

²⁸ *Id.* at § 10.608(b). See *Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 28, 2007 and November 30, 2006 are affirmed.

Issued: September 11, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board