United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
	)	**Docket No. 09-409**
and	)	**Issued: January 8, 2010**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Lakehurst, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 26, 2008 appellant filed a timely appeal of the January 2 and August 7, 2008 merit decisions of the Office of Workers' Compensation Programs, denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that his emotional condition is causally related to a compensable employment factor.

FACTUAL HISTORY

On November 19, 2007 appellant, then a 42-year-old electronics technician, filed a claim (Form CA-2) alleging work-related stress with a specific date of alleged injury of October 24, 2006. He first realized that his stress was work related on April 12, 2007.

Appellant claimed that the supervisor treated him differently and that the October event was the third time his supervisor had "come after" him and that following the event he was evaluated by an employing establishment nurse who sent him home. He contended that his supervisor was aware of his stress condition, which caused him to miss work but, he kept "coming at" him. The employing establishment controverted the claim

By decision dated January 2, 2008, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. Appellant did not submit any evidence establishing that he was harassed by his supervisor.

In January 2008, the Office received a narrative statement from appellant alleging that supervisors Jay Rodney Moss and Leroy Farr had harassed him on a daily basis since April 2005. Appellant stated that his problems began in 2005, when he came under the supervision of Mr. Moss, supervisory general engineer.[1] He asserted that Mr. Moss held a grudge against him because he had been one of the lead plaintiffs in a class action filed against the Navy under the Federal Labor Relations Act. The litigation was successful and resulted in appellant and other employees becoming eligible for overtime pay. He claimed that he had received an award of three years back compensation. Appellant said that Mr. Moss told him directly that he would not receive overtime or a promotion while he supervised him.

Appellant asserted that Mr. Moss belittled him, criticized his work in front of others, refused to authorize overtime after giving verbal approvals, yelled at him and berated him, pounded the desk and required that he undergo a security investigation and that Mr. Moss supplied negative information about him. He failed to secure a renewed clearance. Appellant also claimed that Mr. Moss manipulated the schedule on projects so that he would appear late and limited his ability to work with certain other offices and employees which made his job more difficult. He stated that he believed he was owed overtime pay which he has never received because Mr. Moss had confused and manipulated his time records.

Appellant stated that he filed numerous grievances and Equal Employment Opportunity (EEO) Commission complaints. He claimed he was denied promotions and told he would not be transferred. As a resolution of his complaints, he was eventually transferred to a different supervisor in another department on or about July 23, 2007.[2]

According to appellant, on April 12, 2006 Mr. Moss "went crazy" yelling at him when he answered the telephone during their talk. On October 24, 2006 the date of injury alleged by appellant, the January 2008 statement notes that Mr. Moss initiated disciplinary action against him for failing to follow an order to go to the dispensary upon his return to work. Appellant has a seizure disorder from an earlier, unrelated injury.[3]

[1] Mr. Moss stated he supervised appellant from July 2005 to July 2007 when appellant was transferred.

[2] It appears from the record that appellant was terminated from employment on or about January 2008 because he was denied a security clearance which was essential to his work.

[3] Appellant's claim for the December 1, 1997 employment injury was assigned file number xxxxxx236. He fell at work and a sharp piece of metal penetrated his skull. Seizures appear to have continued into 2007.

Appellant stated that on April 26, 2007 Mr. Moss berated and yelled at him about his job duties. He reported that Mr. Moss denied his request for union representation to avoid having an independent union witness to the conversation. After this encounter, appellant went to the dispensary and was sent home with high blood pressure and rapid pulse. He was off work until on or about July 19, 2007. Appellant also alleged that, after this event, he needed unnamed medications for hypertension, migraines and Xanax.

On July 19, 2007 Mr. Moss attempted to have appellant sign a letter of proposed suspension to verify his receipt of notice. Appellant stated that he refused to sign and that Mr. Moss continued to yell at him and demanded that he sign.

The employing establishment responded on a January 10, 2008 when Lynn P. Palush, injury compensation program administrator, presented a formal controversion of appellant's claim and provided a more complete statement of the employer's position.[4] She stated that Mr. Moss did not harass appellant and only performed his supervisory responsibilities in a diligent manner. Ms. Palush stated that appellant refused to follow administrative policies and procedures such as receiving prior approval from a supervisor before working overtime or requesting leave. On numerous occasions, she reported, appellant worked overtime and later requested that Mr. Moss annotate his timecard. Ms. Palush asserted that Mr. Moss ensured that appellant was compensated and explained the proper procedures for requesting and performing overtime work to him.

With regard to other matters, Ms. Palush reported that in May 2007, appellant had been suspended for an unexcused absence of more than eight hours. She asserted that Mr. Moss treated all of his subordinates in the same manner and required them to follow proper policies and procedures and ensured that their work was completed accurately and in a timely manner. Ms. Palush contended: "The agency feels possibly the medications and injury [appellant] suffered in 1997 are causing [him] to perceive the actions of Mr. Moss are more of a personal attack vs [sic] that of a [sic] effective supervisor carrying out the technical and administrative responsibilities he is expected to perform."[5]

In a narrative statement also received by the Office on January 10, 2008, Mr. Moss denied appellant's allegations at length. He denied retaliating against or threatening appellant.

[4] The Board sees no evidence that Ms. Palush has direct knowledge of the incidents involved in this claim. Her statements do not refer to personal knowledge. Therefore, the Board regards her statement as a fair summary of the information collected and believed relevant by the employing establishment.

[5] Ms. Palush provided the Office a January 23, 2008 addendum to the controversion in which she primarily discussed medical consequences of appellant's alleged alcohol abuse. She stated:

> "This appears to be a continuing problem for [appellant]. We feel alcohol abuse could possibly be contributing to the medical problems he claims in his CA-2 form. He claims on his CA-2 form that he is suffering from high blood pressure and his supervisor is the cause. According to numerous medical articles and publications, alcohol abuse contributes to such things as high blood pressure, difficulties at work and depression. Some symptoms of depression include trouble concentrating, making decisions, headaches, fatigue, sleeping problems, dizziness and exhaustion. Therefore, we contend there is a high probability the alcohol abuse is a large contributor to his problems he is currently having at work."

Mr. Moss stated that, when he supervised him, appellant actually worked more overtime than any other employee in the branch. Appellant's hours had to be adjusted manually when he failed to follow proper procedures and Mr. Moss stated that he was unaware of any outstanding retroactive pay changes for appellant. Mr. Moss stated that promotions for electronics technicians were unavailable and there was no denial as alleged by appellant. He stated that appellant had never requested special accommodations for a health problem or provides medical documentation that directly linked work absences to a medical condition. Mr. Moss stated that, most of the time, appellant did not provide a reason for his absence.

Mr. Moss continued that he had written a glowing testimonial of appellant's work performance prior to becoming appellant's supervisor; and only wanted him to follow procedures.[6] He offered his opinion that appellant resented requirements and supervision, did not work well with others and was unwilling to accept help even when his lack of progress impacted the fleet's needs.

By letter dated January 24, 2008, appellant, through counsel, requested an oral hearing before an Office hearing representative regarding the January 2, 2008 decision.

At a May 15, 2008 hearing appellant testified along with a corroborating witness, Joan Freed. Both witnesses were under oath. Appellant testified that he had been a plaintiff in a successful class action. He said that in April 2005, Mr. Moss told him directly that he would never get overtime or a promotion as long as he supervised appellant. At first, appellant said he did not pay attention to the remark, but then he felt Mr. Moss began to scrutinize his work. Appellant testified that Mr. Moss increased the number of meetings from one a week to three or four to discuss appellant's work progress and priorities. Appellant provided a list of other attendees. At these meetings, Mr. Moss constantly criticized appellant's work and performance.

Appellant testified that in November 2005, he was told to work on the design and manufacturing process of a new piece of Navy equipment which he believed to be unsafe for its use and location on aircraft carriers. He testified that he was told by Mr. Moss to make no changes in the design but that he complained to the Inspector General's office. Appellant repeated in testimony that he feared that someone would be hurt as a result of a defective design. He felt trapped "between a rock and a hard place" by a direct supervisory order and a fear that others might be injured by a design he felt he could improve.

Appellant noted he had to work in many locations on the base and that Mr. Moss did not like the fact that appellant was often not in his regular work space. He felt that Mr. Moss was inconsistent in assigning work and that he made arbitrary changes in the assignments later. Appellant also accused Mr. Moss of listening to telephone calls and other conversations outside his office door.

Appellant identified specific incidents of alleged harassment and abuse in his testimony. He testified that, on April 26, 2007, Mr. Moss came to his work space and began to berate him and change his work assignments. Appellant testified that his job description was being changed

[6] Mr. Moss stated that he had known appellant for 20 years and that he was the most talented electronics technician he had ever known.

and that Mr. Moss continued, "Yelling and screaming." He stated that he wanted to leave because his cardiologist had told him to leave during stressful confrontations but that Mr. Moss told him to stay where he was. Appellant note that he requested union representation three times during this encounter but that Mr. Moss stated that the matter was not a union problem. When the union steward entered appellant's work space, Mr. Moss left rather than continue the meeting. Appellant stated that he was feeling ill and went to the dispensary and he testified that he was sent home. Ms. Freed, a witness for appellant, testified that, on April 26, 2007, she left appellant's work space while Mr. Moss was with appellant and got the union steward. In a signed statement submitted by appellant's counsel after the hearing, Ms. Freed described appellant after the incident as "shaking" and "looking like he was going to have a seizure."

In a second encounter, appellant returned to work on July 19, 2007 after a period of claimed medical disability following the April 26, 2007 incident. He testified that Mr. Moss tried to get him to sign some paperwork imposing a six-day disciplinary suspension without pay. Appellant testified that he refused to sign and that Mr. Moss continued to yell at him.

Appellant's counsel then submitted the July 24, 2007 report of George Peters Ed.D., a licensed psychologist, who evaluated appellant as part of an investigation regarding a security clearance. Dr. Peters diagnosed appellant with mixed personality disorder with possible paranoid features, seizure disorder, hypertension and problems specific to managing interpersonal relationships especially with supervisors. He recommended further psychiatric evaluation for anxiety and insomnia and, in addition, psychological counseling for stress management. Dr. Peters also recommended a neurological evaluation for appellant's documented seizure disorder, which appeared to the examiner to be uncontrolled. He reported that appellant stated that he had a serious stress reaction to an April 26, 2007 incident at work. Dr. Peters also reported that appellant noted that he received a traffic citation on July 19, 2007 because he entered his car hurriedly and drove off before fastening his seat belt because he wanted to "avoid a particular individual." At the hearing, appellant testified that he was seeing a cardiologist and his family physician and expressed a belief that working under the supervision of Mr. Moss was too stressful for him.

The corroborating witness, Ms. Freed, generally supported appellant's version of events. She was not supervised by Mr. Moss or Mr. Farr. Ms. Freed stated that she shared office space with appellant during the period in question but that she was not always present in her office. She testified that she had worked for the employing establishment for 28 years. Ms. Freed testified that she knew appellant and Mr. Moss well and that for a number of years, they had all been friends.

Ms. Freed testified that, in April 2005, Mr. Moss spoke to her in the parking lot. It was her testimony that he held a piece of paper and was "smacking it." The paper concerned the overtime class action and Mr. Moss asked Ms. Freed if she had "signed it." Ms. Freed testified that she had and that almost everyone else had signed it as well. Mr. Moss then asked her if appellant had signed it and Ms. Freed stated that he had. Ms. Freed testified that Mr. Moss became angrier and said to her that appellant would never get a promotion or overtime. She stated that about an hour later, Mr. Moss called and apologized for yelling at her and noted he had forgotten that she did not work for him. Ms. Freed testified that Mr. Moss then explained to

her that he had proposed a budget that did not include the cost of the litigation and that he felt it would make him look bad.

After that conversation, Ms. Freed testified that Mr. Moss repeatedly yelled at appellant in her presence and that she felt that she experienced panic attacks from the behavior of Mr. Moss. She was able to offer limited information about the events of April 26, 2007. Ms. Freed testified that she was present on July 19, 2007, when Mr. Moss attempted to have appellant sign some papers connected with his suspension. She testified that she filed a police report on July 23, 2007 about the behavior of Mr. Moss toward appellant and herself. The eventual disposition of the matter is not clear from the record.

In addition, Ms. Freed testified that, in 2007, everyone who worked on a particular Navy camera system received a cash award and a letter of appreciation authorized or approved by Mr. Moss. Although appellant worked as a central participant in the project he did not receive an award or a letter. Ms. Freed testified that Mr. Moss told other employees that everyone was getting a little extra because "one person in the department that was n[o]t getting anything." Appellant testified the award was the subject of a grievance but did not mention any disclosure of information about him by Mr. Moss.

In her post-hearing signed statement, received by the Office on or about June 16, 2008, Ms. Freed clarified her testimony and stated that she personally overheard Mr. Moss make the statement to others that appellant was not being included in the awards to other employees. She stated that she had also been told by other employees that Mr. Moss was publicly discussing appellant's noninclusion.

Ms. Freed stated that she felt harassed and used by Mr. Moss when he telephoned to ask where appellant was. She testified that she listened to voice messages from Mr. Moss which appellant saved and which she described as "nasty and angry." Ms. Freed testified that she believed appellant was being treated unfairly by Mr. Moss.

Ms. Freed noted in her statement that Mr. Moss complicated appellant's work assignments by frequently contradicting verbal instructions with e-mails and frequently changing his team leader for purposes of requesting leave. She testified that Mr. Moss gave verbal authorizations for appellant's overtime and then said he could not remember, or that he had not given any authorization at all.

Ms. Freed also noted in her statement that she had overheard Mr. Moss tell appellant, in front of other employees, that he was to be replaced by another employee, Rod MacRae. She stated that she heard Mr. Moss direct appellant to train his own purported replacement. Appellant did not mention this incident and Ms. Freed did not mention it in her hearing testimony.

The employing establishment offered comments on the hearing transcript in a memorandum dated June 12, 2008 signed by F.A. Renz III. The response included further comments from Mr. Moss referring to page and line cites in the transcript. The employing establishment also resubmitted a copy of the January 23, 2008 controversion by Ms. Palush and a report by a psychologist.

Mr. Moss again denied all of the allegations made by appellant and Ms. Freed with regard to inappropriate demeanor and behavior. He repeated his view that appellant was difficult to supervise and that, as a supervisor, he had done nothing more than try to make appellant follow the same rules as every other employee.

On the April 26, 2007 and July 19, 2007 encounters with appellant and Ms. Freed, Mr. Moss wrote after the hearing:

> "When [appellant] stated that his blood pressure was going up just talking to me, I recommended that he go to medical. I never told him he was n[o]t going anywhere and to sit down. I never denied him union representation. I stated [that] he did n[o]t need union representation every time we had a meeting. When the union steward showed up in the office, I chose to end my conversation with [appellant]."

Concerning July 19, 2007, he wrote:

> "Incorrect, see memo[random] of record. Ms. Freed left room as soon as I entered, came back once and removed her keys and bag then came back a second time and picked up [appellant's] keys from the hook on his desk where he always keeps them. I never went wild, never yelled at the top of my lungs, never grabbed Ms. Freed, never chased anybody. After [appellant] refused to sign the proposed suspension letter and left, I [tele]phoned the HR specialist and reported what happened. I went back to my office and drafted a memo[random] of record describing the incident and, faxed it to HR."

These denials refer to pages and lines in the hearing transcript but are almost exact repetitions of earlier statements and provide no new information about the events.

On the matter of awards, Mr. Moss wrote:

> "Never went around discussing anybody's spot awards. [Appellant] did not receive any awards at my discretion because I felt he did not deserve one. It was not appropriate. While [he] should have been working on this [Camera system] project he was found to have left work and was subsequently suspended for his actions. [Appellant] was displaying repeated leave abuse and insubordination resulted in one formal suspension, formal verbal warning regarding verbal abuse of coworker…."

The statement confirms only that appellant was not given an award and, again, repeats earlier generalized accusations of bad behavior by appellant.

On the alleged statements reported by appellant and Ms. Freed concerning appellant's chances for overtime and promotion, Mr. Moss wrote:

> "Fabrications. No statement was ever made regarding overtime or promotions. [Appellant] was GS 586-12. He worked more OT than any other person in 4883. There was no payout from 4883 regarding FSLA lawsuit…. There were no

promotion opportunities above journeyman level for any GS856 in all of 488 in the last several years."

This notation repeats earlier denials but provides no further details.

By decision dated August 7, 2008, an Office hearing representative noted that appellant was a credible witness but affirmed the January 2, 2008 decision[7] finding that appellant had failed to establish a compensable factor of his employment.

LEGAL PRECEDENT

A claimant 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 factors of his federal employment.[8] To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[9]

Where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.[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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[11]

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*,[12] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[13] 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 Federal Employees'

[7] It appears that in the August 7, 2008 decision the hearing representative misstated that the issue in the case was whether appellant was entitled to an additional schedule award for the right upper extremity as she determined that the evidence of record failed to establish that he sustained an emotional condition in the performance of duty.

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

[9] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[10] *Robert Breeden*, 57 ECAB 622 (2006).

[11] *Jeral Gray*, 57 ECAB 611 (2006).

[12] 28 ECAB 125 (1976).

[13] 5 U.S.C. §§ 8101-8193.

Compensation Act.[14] 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.[15] 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 Federal Employees' Compensation Act.

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.[16] 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.[17] 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.[18]

Under the Federal Employees' Compensation Act the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Federal Employees' Compensation Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[19]

ANALYSIS

The factual background of this claim presents the interpretations of events offered by the employing establishment and appellant which conflict on many relevant points. The Board must discern that evidence which appears most relevant and credible. Given the sharp disagreements

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

[15] *Lillian Cutler*, *supra* note 12.

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

[17] *Felix Flecha*, 52 ECAB 268 (2001).

[18] *James E. Norris*, 52 ECAB 93 (2000).

[19] *Beverly R. Jones*, 55 ECAB 411 (2004).

in the evidence, the Board must look for specificity as to time, circumstance and corroborating evidence.

Appellant has the burden to prove that alleged events constituting harassment did, in fact, occur.[20] The claim that the supervisor manipulated appellant's overtime compensation and leave is not sufficiently specific with regard to dates and amounts claimed. The employing establishment has denied knowledge of compensation owed and asserts that appellant's failure to follow established procedure for requesting overtime and leave caused any pay or leave errors. Appellant has asserted that he was denied promotions and transfers and was subjected to increased scrutiny by his supervisor. There is no evidence, however, from appellant that promotions were available, nor does the record show that he was denied any promotion he actually applied for between 2005 and 2007. The employing establishment denies that any promotion opportunities were available. Accordingly, the Board finds no compensable factor established in this regard.

Appellant has made general accusations that he was yelled at, berated and subjected to other unprofessional treatment by his supervisor. This is supported by appellant and Ms. Freed, each of whom testified under oath at the hearing that this was a consistent pattern of behavior by appellant's supervisor, Mr. Moss, who had a grudge against appellant. Mr. Moss has flatly denied behaving in an unprofessional manner toward appellant or Ms. Freed. Further, Mr. Moss states that appellant was difficult to supervise and had a habit of abusing leave, failing to respect priorities set by supervision and insubordination. The Board is unable to determine that the employment factors above, as alleged by appellant, are established because the record is balanced and refuted by offsetting assertions and denials. A factor is not established.

Appellant has alleged that he was stressed and unhappy over a decision to puce a piece of equipment to be placed aboard aircraft carriers which he believed was not safely designed. Appellant wanted the design altered but was told to proceed with the original design. Appellant complained to the Inspector General's office. There is conflicting evidence about the final outcome of appellant's complaint. The Board finds that appellant was distressed primarily by his supervisor's instructions. An employee's unhappiness with work assignments or perceived poor management is not compensable.[21] The Board does not find a factor.

Both appellant and Ms. Freed testified under oath that in April 2005, Mr. Moss told each of them separately that because appellant had been a plaintiff in a legal action against the Navy that he would not receive overtime or a promotion while Mr. Moss supervised him. Mr. Moss has denied several times in written statements that he made this threat. He points out that he approved significant overtime for appellant over about two years. This fact does not establish that the threatening statement was not made but rather that, if made, it was not fully carried out. He also asserts that no promotions were available to appellant. Again, this may prove, at most, that no threat could have been carried out. It does not, however, establish that statements related by appellant and Ms. Freed that a threat was made by Mr. Moss are false. The Board finds that appellant's allegation that Mr. Moss made the statements in question is credible. It is specific as

[20] *Katherine A. Berg,* 54 ECAB 262 (2002).

[21] *Peter D. Butt, Jr.,* 56 ECAB 117 (2004).

to the time period of April 2005. Both appellant and Ms. Freed have testified under oath that the statements were made directly to them. While Ms. Freed is unquestionably sympathetic to appellant, there is no reason to believe that she would testify falsely under oath. The threatening statement made to appellant and repeated to Ms. Freed is evidence tending to show that Mr. Moss intended to retaliate against appellant for his role in litigation against the Navy. The threat itself is a compensable factor of employment and it raises an inference that subsequent actions by Mr. Moss were intended as harassment of appellant.

Similarly, Ms. Freed in her testimony and in her subsequent signed statement stated that she personally heard Mr. Moss tell other employees that their cash awards in connection with a camera system project were larger because one person in the department did not get an award. Appellant, in his testimony noted only that he had filed a grievance on the matter but did not state he heard comments about himself made by Mr. Moss. While acknowledging that he did not authorize any award for appellant, Mr. Moss denied making any statement about it to others. The Board finds that the testimony of Ms. Freed to be credible. There is no independent evidence in the record showing that appellant played a significant role in the camera system project. It is possible, as the employing establishment asserts, that appellant was the only person in the department who did not deserve an award. However, there was no conceivable administrative reason to disclose appellant's exclusion from the group award to other employees. The disclosure of personal information about appellant's failure to get an award to other employees constitutes harassment of appellant and is a factor of employment.

Ms. Freed wrote in her signed statement that she personally heard Mr. Moss tell other employees that Mr. MacRae would replace appellant. Mr. Moss responded in some detail in his statement that Mr. MacRae was assigned to help appellant with his workload and that both appellant and Ms. Freed treated Mr. MacRae disrespectfully and were uncooperative. The Board has held that the assignment of work is an administrative function of the employer and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act. Absent error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.[22] The record provides only two, contradictory, signed statements one affirming and the other denying that Mr. Moss discussed Mr. MacRae as appellant's replacement with coworkers. It is impossible to determine which of the offsetting statements is correct. Appellant failed to establish that this alleged statement by Mr. Moss was made and it is not found to be a compensable employment factor.

Both appellant and Ms. Freed testified that, on April 26, 2007, Mr. Moss entered appellant's work space and began to speak loudly with him about his workload and position description. Appellant noted that he asked to be excused to go to the dispensary and that Mr. Moss denied his request. Mr. Moss denied this. Appellant asked that a union representative be present and stated that Mr. Moss denied that request. Mr. Moss stated that he did not deny the request but told appellant he did not need a union representative at every meeting they had. He left abruptly when the shop steward arrived. Ms. Freed confirmed that Mr. Moss was loud and that she went and got the shop steward for appellant. The Board finds that appellant, Mr. Moss and Ms. Freed agree substantially in their account of these events. They differ in vital details

[22] *Donny T. Drennon-Gala*, 56 ECAB 469 (2005).

and in the inferences they draw. Ms. Freed testified that appellant looked sick after Mr. Moss left and all parties agree that appellant went immediately to the dispensary. He was sent home for health reasons that day. The Board finds the testimony of appellant and Ms. Freed to be credible that appellant's supervisor was loud, abusive, did not allow appellant to have a union representative present and did not allow him to go to the dispensary. When the union representative, arrived the supervisor left and appellant went to the dispensary. The Board finds this event to be harassment of appellant and to be a compensable factor of employment.

Finally, both appellant and Ms. Freed testified, under oath, that when Mr. Moss came to appellant's work space on July 19, 2007, to obtain a signature pertaining to appellant's suspension, Mr. Moss yelled at both of them "screaming at the top of his lungs." When appellant would not sign the paper, Mr. Moss continued loudly to demand a signature. Ms. Freed stated that she and appellant both had to leave the work space. She went to the police several days later and filed a report. In his written statements, Mr. Moss denied raising his voice or behaving in an unprofessional manner. Reprimands, counseling sessions and other disciplinary actions are administrative matters that are not covered under the Federal Employees' Compensation Act unless there is evidence of error or abuse.[23] The Board finds that the testimony of appellant and Ms. Freed is credible. Appellant mentioned this event contemporaneously to Dr. Peters who included it in his July 24, 2007 report. Ms. Freed's report to the police of July 23, 2007 is close in time to the July 19, 2007 incident. At a minimum, the Board finds these contemporaneous events tend to confirm that the July 19, 2007 incident was disturbing to the witnesses at the time and that it is not a subsequent fabrication. On this occasion, Mr. Moss unreasonably raised his voice and continued to demand that appellant sign the paper in question even after appellant said he would not do so. He ignored appellant's request to seek medical attention and denied appellant time to get union assistance. The Board finds that both appellant and Ms. Freed left the work space in response to inappropriate and unprofessional supervisory behavior. The Board finds that the manner in which this episode was handled is consistent with a pattern of harassment of appellant by Mr. Moss and constitutes a factor of employment.

The Board finds the several factors of employment enumerated above to be supported and specific. Each such allegation is corroborated by hearing testimony and the post-hearing statement of Ms. Freed. None of the specific events determined to be compensable employment factors has received anything beyond a general written denial from the employing establishment. Each event, in succession, represents an instance of harassment, error and abuse on the part of management first by threatening appellant because of his role in litigation, second in disclosing to others information about appellant's exclusion from a group award and third, by corroborated loud, intimidating behavior at least on April 26 and July 19, 2007.

With regard to the hearing representative's decision, the Board notes that the decision describes Ms. Freed's evidence as "hearsay." The Board finds that, in the instances identified previously, Ms. Freed testified to events based upon her own, first-hand, knowledge. This is not hearsay evidence. In weighing the contradictory evidence in this claim, the Board considered the fact that appellant and Ms. Freed testified under oath. The hearing representative had the opportunity to observe the demeanor of each witness and to ask questions. The hearing

[23] *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

representative specifically noted, in her decision, that appellant's testimony was credible. By contrast, the statements offered by the employing establishment were not under oath and the persons who provided information were not subject to questioning. The statements by Mr. Moss were not corroborated by any other witness or by contemporaneous evidence.

The employing establishment controverted appellant's claim based in significant part on lay medical opinion that his complaints could be explained as the result of medication, alcohol and his bad work attitude. The Board finds these gratuitous suggestions unpersuasive. No evidence of record tied appellant's purported alcohol or medication-related condition to any of the alleged events of the claim. The employing establishment offered no evidence that appellant was intoxicated or having a reaction to his medication during any of the reported incidents in this claim. Appellant visited the dispensary and there is no report in the record suggesting he was under the influence of any substance when examined. Further, laypersons are not competent to render a medical opinion.[24]

On the contrary, Dr. Peters offered convincing evidence that appellant suffers from some emotional or psychiatric condition. The remaining question is whether any medical condition was caused or exacerbated by the compensable factors of employment found herein.

Appellant's counsel presented a brief in this appeal, but in light of our review of this case and holding an independent discussion of appellant's brief would be cumulative.

CONCLUSION

The Board finds that appellant has established as factors of employment that he was harassed by his supervisor and that the medical evidence, at minimum, establishes a diagnosed emotional or psychiatric condition. On remand, the Office should develop and review the medical evidence to determine whether it establishes a causal relationship between the compensable employment factors and appellant's medical condition. After any further development as the Office deems necessary, it should issue an appropriate decision.

[24] *Desidero Martinez,* 55 ECAB 245 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 7 and January 2, 2008 decisions of the Office of Workers' Compensation Programs are reversed and the case is remanded for further action consistent with the decision of the Board.

Issued: January 8, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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