

work on December 15, 2008. In letters dated March 23, 2009, the Office informed appellant of the evidence needed to support his claim and requested that the employing establishment respond.

In an April 27, 2009 decision, the Office denied the claim. It found that appellant did not submit any medical evidence in support of his claim or adequately identify the factual basis for his claim.

Appellant timely requested a hearing¹ and submitted additional evidence including several statements. He alleged that in 2002 Mark Treadway, then a coworker, created an offensive environment that led to a physical confrontation between the two men, after which appellant received a “last chance agreement” to retain employment. He stated that Mr. Treadway continued to harass him, which increased after Mr. Treadway became his supervisor. Appellant alleged that he was also harassed by Kevin R. Milliken, assistant chief of the engineering service, and Daniel B. Snyder, acting associate director. On November 26, 2008² he was returning from building 34 to building 200E2 at approximately 9:45 a.m. while talking with his wife on his cellular telephone. Mr. Treadway walked towards him yelling in an aggressive voice, asking where appellant had been and why he was not on the job site. Appellant explained to Mr. Treadway that he had to put a jar of apple butter in the van and then went to the restroom because he was sick, and then had to wait for a ride because the van was in use. After this confrontation, he went to see Mr. Milliken about his relationship with Mr. Treadway. He asked to be transferred because he felt Mr. Treadway was pushing him to a breaking point, noting that he had post-traumatic stress disorder (PTSD) and was under medical care. Appellant also submitted Steps 1 and 2 of a grievance he filed pertaining to confrontations with Mr. Treadway. He stated that it was impossible for him to work under Mr. Treadway’s direction and that coworkers were fearful of testifying on his behalf. He asked to be moved to another unit.

In reports dated December 3, 2008 and March 2, 2009, Dr. Elizabeth Ann Ahmad, a psychiatrist, noted that appellant had been diagnosed with PTSD with an exacerbation of symptoms beginning in September 2008 due to, in his viewpoint, harassment at work by an interim supervisor. In a March 18, 2009 treatment note, Dr. Jeanne Lynne Lewis, a psychiatric resident physician, advised that appellant felt he was being harassed at work by a former coworker who was now his supervisor and was trying to obtain a transfer. She diagnosed PTSD.

In a November 26, 2008 statement, appellant’s wife advised that, while speaking with her husband on the telephone, she overheard someone speaking in a very loud and demanding voice, asking that appellant answer where he had been. In a November 26, 2008 statement, Troy Graybeal, a coworker, advised that he was called by appellant’s wife who reported that she overheard Mr. Treadway yelling and screaming at appellant and asked that Mr. Graybeal check on him. In a December 3, 2008 statement, Bryon C. Stout, a coworker, advised that on November 26, 2008, as he returned from a doctor’s appointment, he met Mr. Treadway who asked in a loud tone where he had been. He stated that Mr. Treadway explained that

¹ Both appellant and the employing establishment submitted evidence received on April 24, 2009 that was not reviewed by the Office in its April 27, 2009 decision.

² Appellant identified the incident as occurring on November 28, 2009.

Mr. Milligan wanted everyone on the job site. In a June 1, 2009 statement, Don Sartin, a retired supervisor, stated that he was appellant's supervisor for approximately 22 years and the only problem appellant had was with Mr. Treadway. Johnny McInturff and Phil Harding, former coworkers, provided statements attesting to appellant's character. On May 15, 2009 appellant's union filed a charge against the employer alleging that it had reneged on a settlement agreement with appellant regarding a transfer. Eight of appellant's coworkers signed a statement attesting:

"We are of the understanding that Mr. Kevin Milliken has made untrue written statements in my behalf regarding [appellant's] case. I personally did not give my consent nor did I sign any statement showing that I did indeed make such statements and/or comments. Therefore, I could possibly consider this slander."³

The employing establishment controverted the claim, and submitted a last chance agreement signed by appellant and a decision on proposed removal, both dated October 9, 2002. Appellant's removal was lessened to a four-day suspension with a one-year probationary period. In several statements dated from February 27 to April 10, 2009, Mr. Milliken advised that he had investigated the November 26, 2008 incident between appellant and Mr. Treadway. On February 25, 2009 he interviewed Mr. Treadway who explained that many workers had disappeared from the job site on November 26, 2008 and he was trying to find out where everyone went. When he asked appellant why he was taking so long to get back to work, appellant told him he was on the telephone and to leave him alone. In a firm voice, Mr. Treadway told appellant he should not be on the telephone when he should be working and denied that he yelled at appellant. Mr. Milliken also interviewed a number of coworkers on February 25 and April 8, 2009, and none reported witnessing the incident or thought there was a hostile work environment.⁴ On March 4, 2009 he held a meeting with appellant who appellant stated his psychiatrist advised that he should not work for an additional three months and asked to be transferred when he returned to work, stating that he would never work for Mr. Treadway. In an April 1, 2009 response to a formal grievance, Mr. Milliken advised the union that appellant's requested transfer could not be justified because evidence did not establish that a hostile work environment existed and appellant's skills were required in his assigned job. In a May 8, 2009 response to the grievance, Mr. Snyder proposed to detail appellant to another unit, and appellant signed the agreement on May 14, 2009.

At the hearing, held on August 24, 2009, appellant testified that in 2002 he and Mr. Treadway had a physical fight and that Mr. Treadway became appellant's acting supervisor in October 2008. He described the November 26, 2008 incident, stating that Mr. Treadway yelled at him and got in his face and had no justification other than he and others were late getting back to work. He stated that he had service-related PTSD that was aggravated by work, and that he was off work for approximately six months and wanted wage-loss compensation.

³ The signatures appear to be those of Michael A. Burns, Kevin Davenport, Kenneth Lavigne, Mr. Graybeal, William R. Edwards, Robert Franklin, Ronny Emerson and Mr. Stout.

⁴ Mr. Milliken noted that he interviewed Mr. Lavigne, Mr. Stout, Mr. Edwards, Mr. Graybeal, Mr. Davenport, Mr. Burns, Barry Baker and Joel Higgins. Mr. Milliken stated that Mr. Stout reported that on November 26, 2008 he heard loud voices down the hall that sounded like Mr. Treadway and appellant but that he did not hear what was stated, and Mr. Edwards stated that he was questioned by Mr. Treadway regarding his absence from the job site on November 26, 2008.

Appellant's union representative argued that appellant should have been transferred earlier, stating that the union filed an unfair labor practice and as a result appellant was transferred and could never be under Mr. Treadway's supervision.⁵

By decision dated November 3, 2009, an Office hearing representative affirmed the April 27, 2009 decision, finding the evidence insufficient to establish verbal abuse on November 26, 2008 or that the employing establishment committed error by not transferring appellant.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or stress-related 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 stress-related condition.⁶ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁷ 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

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*,⁹ 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.¹⁰ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.¹¹ 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 his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the

⁵ The hearing representative asked appellant's representative to submit the settlement agreement but the record does not indicate that she submitted a copy.

⁶ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ 28 ECAB 125 (1976).

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ See *Robert W. Johns*, 51 ECAB 137 (1999).

work.¹² Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.¹³ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁴ Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁵

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.¹⁶ Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹⁷

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. 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 that the harassment occurred with probative and reliable evidence.¹⁸ 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 Equal Employment Opportunity 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 Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁹

ANALYSIS

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

In the present case, appellant has not attributed his emotional condition to the performance of his regular duties or to any special work requirement arising from his

¹² *Lillian Cutler*, *supra* note 9.

¹³ *J.F.*, 59 ECAB 331 (2008).

¹⁴ *M.D.*, 59 ECAB 211 (2007).

¹⁵ *Roger Williams*, 52 ECAB 468 (2001).

¹⁶ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁷ *Kim Nguyen*, 53 ECAB 127 (2001).

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

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

employment duties under *Cutler*.²⁰ His claim pertains to allegations of administrative error and harassment by Mr. Treadway, particularly regarding a November 26, 2008 incident and that the employing establishment would not grant his request for a transfer.

Regarding appellant's claim that he was inappropriately yelled at by Mr. Treadway on November 26, 2008, a verbal altercation, when sufficiently detailed by the claimant and supported by the evidence, may constitute a compensable employment factor.²¹ This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.²² Mr. Milliken conducted two fact-finding interviews, and none of appellant's coworkers acknowledged witnessing the incident. While appellant's wife asserted that she overheard Mr. Treadway speaking in a loud and demanding voice, Mr. Milliken advised that Mr. Treadway reported that on November 26, 2008 he was searching for various workers who had disappeared from the job site. When he encountered appellant in the hallway talking on the telephone, he questioned him in a firm voice about where he had been but denied that he yelled. The Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.²³ Mr. Treadway explained that he was frustrated because employees had disappeared from the job site. The Board finds that the evidence does not establish that Mr. Treadway inappropriately yelled at appellant on November 26, 2008; he did not establish a factual basis for his allegation of verbal abuse.²⁴

Regarding appellant's request for a transfer, denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment absent a showing of error or abuse as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute a desire to work in a different position.²⁵ Mr. Milliken explained that appellant's transfer request was not justified because his skills were required at his assigned job. Appellant's representative asserted that the employing establishment went back on a promised transfer in May 2009 and that a settlement had been reached in July 2009. The record does not contain a copy of any decision or agreement regarding a transfer and appellant testified at the hearing that he had been transferred and no longer worked for or with Mr. Treadway.²⁶ Appellant submitted no evidence to show that the denial of a transfer was erroneous and therefore failed to establish a compensable work factor in this regard.

Regarding his general contention that he was harassed by employing establishment management, including Mr. Treadway, Mr. Milliken and Mr. Snyder, mere perceptions of

²⁰ See *James E. Norris*, *supra* note 18.

²¹ *C.S.*, 58 ECAB 137 (2006).

²² *J.C.*, 58 ECAB 594 (2007).

²³ *T.G.*, 58 ECAB 189 (2006).

²⁴ *C.S.*, *supra* note 21.

²⁵ *Hasty P. Foreman*, 54 ECAB 427 (2003).

²⁶ *Supra* note 5.

harassment or discrimination are not compensable under the Act,²⁷ 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, while appellant submitted several statements from coworkers, former coworkers, and his wife, none provided a sufficient explanation to demonstrate harassment on the part of employing establishment management. He did not submit a final settlement regarding the grievance filed in regard to the requested transfer. Thus, as the record does not contain a final decision and as he submitted no evidence to show a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers,²⁹ the Board finds that he did not establish a factual basis for his claim of harassment by probative and reliable evidence.³⁰

For the foregoing reasons, appellant has not established a compensable employment factor of employment and therefore did not establish that he sustained an emotional condition in the performance of duty as alleged.³¹

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

²⁷ *James E. Norris, supra* note 18.

²⁸ *Id.*

²⁹ *Beverly R. Jones, supra* note 19.

³⁰ *See Robert Breeden, 57 ECAB 622 (2006).*

³¹ As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Katherine A. Berg, 54 ECAB 262 (2002).*

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 10, 2010
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