

FACTUAL HISTORY

On July 12, 2008 appellant, then a 59-year-old statistician, filed an occupational disease claim alleging that he sustained an emotional condition as a result of on-the-job stress. He alleged that as a result of the stressful conditions at work he suffered from, hypertension, dizziness, ringing in his ears, extreme fatigue, headaches and confusion.

In statements of records appellant alleged that his supervisor, Associate Director Genevieve Notah, was prejudiced towards older white men and envious of his happy marriage. During his first week of employment, Ms. Notah reprimanded him for attempting to exercise his civil rights to pursue a customer complaint against Atlas Moving Company. She did not allow appellant to pursue the claim and made him apologize to the company. That same week, Ms. Notah repeatedly mocked and sneered at him for taking a full hour lunch at home with his wife. This occurred the week of March 16, 2008 and many times since. Appellant alleged that Ms. Notah required him to abide by more stringent rules with regard to leave time and on June 6, 2008 applied rules differently than those approved by a timekeeper. He alleged that she spoke to him in a scornful and chiding manner in the presence of a fellow employee, Ruby Spencer. Ms. Notah engaged in daily ridicule and spoke to appellant disdainfully concerning his professional abilities. On several occasions, she assigned him a project, altered or changed the terms of the tasks and then blamed him for doing the task incorrectly. This happened several times from mid-April to June 19, 2008. Appellant alleged that Ms. Notah embarrassed him on Thursday, June 19, 2008 by asking him to redo suspiciously mundane tasks in front of Ms. Spencer and Patricia Wilson. Ms. Notah frequently and unexpectedly appeared in his office and demanded that he explain work that he submitted weeks prior and then called him unorganized.

Ms. Notah scolded appellant for forwarding a copy of an e-mail, telling him that it was against rules to send e-mails containing patient's names and personal information. At other times, she scolded him if he failed to send her e-mails. Appellant alleged that he worked in a hostile workplace and was treated unfairly and differently from other employees. He was not reimbursed for travel expenses in a timely manner and had to wait three months for reimbursement of \$1,756.00 for business trips he made in mid-March 2008 while all other employees were reimbursed the same week. Appellant alleged that his employer was aware of the harassment by Ms. Notah, but did nothing. On the claim form Ms. Notah advised that he informed her on June 23, 2008 and on prior occasions that he was not feeling well, of trying to adjust to the altitude, that he experienced diverticulitis or had overworked himself working in the garden. He did not report his condition to her directly.

Appellant submitted correspondence related to the Atlas Moving Company. His household goods were packed on March 19, 2008 and the moving company informed him that delivery would not be made until March 31, 2008, which was unacceptable. In a March 25, 2008 e-mail, appellant notified the moving company that he was writing a letter to his congressman suggesting that it be banned from a list of approved movers, suggesting further regulation of movers and that consumers be allowed to collect penalties if a move takes over five days. In a March 25, 2008 e-mail, he stated that his employer informed him of a complaint by the moving company and he apologized.

On July 23, 2008 the employing establishment reviewed appellant's complaint and advised him that, if not resolved to his satisfaction, he had the right to file a formal complaint with the EEOC.

On August 18, 2008 the Office asked appellant to submit further information in support of his claim. On September 11 2008 appellant reiterated his complaints regarding Ms. Notah, alleging a daily campaign of personal harassment. He alleged other employees were allowed to use leave but he was not. Appellant submitted what he described as a "threatening letter" from Ms. Notah that discussed his leave situation commencing June 23, 2008. As of July 2, 2008, he would deplete his leave, credit hours and compensatory time and she would place him on leave without pay. Appellant complained that, despite his credentials which included a Ph.D. in sociology, Ms. Notah only allowed him to perform the duties a statistician 10 percent of the time and most of his assigned work was of a clerical nature. He submitted copies of e-mails with regard to a salmonella outbreak. Appellant also contended that he was not given a proper computer or the software needed to perform his job.

Appellant submitted a copy of his EEOC complaint. He alleged that Ms. Notah sent him harassing e-mails, telephone calls and letters. Ms. Notah was interviewed by an EEOC counselor on July 23, 2008, at which time, she noted that she was a Native American Indian -- Navajo. Ms. Notah stated that appellant had written a letter to Atlas Moving Company and that several employees, including herself, became involved in this concern. The complaint needed to be handled appropriately with appropriate officials since the employer became involved. Ms. Notah noted that appellant was never reprimanded for this. She denied ever mocking or sneering at him for taking his lunch break with his wife or acting in a scornful or chiding manner in the presence of other employees. Ms. Notah noted that she corrected his work at times. She mentioned a project that was assigned to appellant that required updating and correcting and that he was not blamed or found at fault. Appellant's work had to be corrected as he was learning the system. Ms. Notah occasionally went into his office for business but never blindsided him.

In a July 16, 2008 letter, Ms. Notah advised appellant that he had been absent from work beginning June 23, 2008 and had exhausted all of his leave. It was apparent that appellant had a medical condition that was interfering with his attendance at work. Ms. Notah asked him to submit proper medical documentation so that management could make a determination regarding his medical condition and the availability of work.

On September 16, 2008 Ms. Notah advised that the employer controverted appellant's claim. Appellant began work on March 12, 2008 and stopped on June 23, 2008. This was a period of orientation and the assigned projects were routine and not stressful. Ms. Notah was unaware of any conflicts between herself and appellant. On one occasion, appellant sent an e-mail containing the names of patients relative to a salmonella outbreak. Ms. Notah reminded him of his recent Privacy Act training.

In a decision dated October 9, 2008, the Office denied appellant's claim, findings that he failed to establish any compensable factors of federal employment.

Appellant requested reconsideration. He submitted e-mail correspondence with regard to reimbursement for travel expenses. A July 22, 2008 e-mail from Gerald Jochem indicated that

he would not ask Ms. Notah to stop contacting appellant as she was his first line supervisor and had a right to communicate with him. Appellant had an obligation to respond to her and keep her informed of his medical status. He also submitted a memorandum to the lead EEOC counselor amending his complaint to include reprisal under the Federal Whistleblowers Act by Mr. Jochem, who was also threatening to change his leave status to absent without leave. Appellant enclosed copies of letters asking that Ms. Notah not contact him as he found her letters and e-mails very stressful.

By decision dated February 9, 2009, the Office denied modification of the October 9, 2008 decision.

By letter dated February 13, 2009, appellant expressed various concerns regarding the Office's handling of his case. He wrote other letters of complaint, stating that he wanted the Office to resolve certain concerns before he requested reconsideration.

By letter dated May 5, 2009, appellant requested reconsideration. He reiterated the allegations with regard to harassment and stressful situations at work. Appellant listed various incidents, argued that each occurred in the performance of duty and contended that appropriate supporting evidence was provided.

On December 1, 2009 appellant submitted affidavits in support of his emotional condition claim. In a September 9, 2009 affidavit, Ms. Spencer stated that she worked 39 years at the employing establishment including while appellant was employed. She observed Ms. Notah's treatment of appellant as her workstation was approximately 20 feet from him and stated that he was treated unfairly by Ms. Notah, who changed his work assignments, treated him as clerical and not as a professional and alleged that he was not given proper orientation with regard to health-related statistics. Ms. Spencer stated that Ms. Notah only thought of herself and did not see the good in her former employees. In a September 9, 2009 affidavit, Marlene A. Lucher advised that she worked as Ms. Notah's secretary from February 7, 2005 until September 1, 2006 when she retired. She generally contended that Ms. Notah was abusive to older employees. In an affidavit dated September 15, 2009, Elsie Chase noted that she formerly worked as a secretary for Ms. Notah from June 1995 to March 1996 at which time she initiated a transfer because she did not like working for Ms. Notah.

By decision dated December 30, 2009, the Office denied modification of its February 9, 2009 decision.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, a claimant must submit: (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 her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.¹ If a claimant does implicate a factor of employment, the Office should

¹ G S., Docket No. 09-764 (issued December 18, 2009); *Leslie C. Moore*, 52 ECAB 132 (2000).

then determine whether the evidence of record substantiates that factor.² 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.³

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*,⁴ 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.⁵ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁶ 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 work.⁷ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁸

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.⁹ 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.¹⁰

For 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 action occurred. A claimant must establish a factual basis for his or her allegations

² *Dennis J. Balough*, 52 ECAB 232 (2001).

³ *Id.*

⁴ 28 ECAB 125 (1976).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁷ *Lillian Cutler*, *supra* note 4.

⁸ *Roger Williams*, 52 ECAB 48 (2001).

⁹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹⁰ *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

that discrimination occurred with probative and reliable evidence.¹¹ With regard to emotional claims arising under the Act, the term discrimination or harassment as applied by the Board is not the equivalent of that as defined or implemented by other agencies, such as the EEOC which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.¹²

ANALYSIS

Appellant alleged an emotional condition as a result of his treatment by his supervisor, Ms. Notah and to employment in a hostile work environment. The Board notes that appellant did not attribute his condition to the performance of his duties as a statistician under *Culter*. Rather, his allegations concern personnel or administrative matters. Specifically, appellant alleged that Ms. Notah did not like him taking his lunch break at home and made him abide by more stringent rules with regard to leave than other employees. He alleged that he was not timely reimbursed for certain business expenses for travel and was assigned to work of a clerical nature. The Board has held that an administrative or personnel matter will be considered to be an employment factor only where the evidence discloses error or abuse on the part of the employer.¹³ In determining whether the employer has erred or acted abusively, the Board has examined whether employing establishment personnel acted reasonably.¹⁴ Appellant submitted e-mails detailing injuries by Ms. Notah with regard to his leave after he stopped work on June 19, 2008. He submitted a July 16, 2008 letter that he characterized as "threatening." Ms. Notah advised appellant that he had depleted his leave, credit hours and compensatory time and would designate his remaining leave as leave without pay. Appellant also contended that Mr. Jochem threatened him with absent without leave status. The Board finds that evidence of record does not establish that appellant's supervisors erred or were abusive by informing him that he was to be placed in a leave without pay status. It was reasonable that once appellant used his available leave, that the employer would place him in a leave without pay or absent without leave status pending submission of requested medical evidence regarding his absence from work. Appellant has failed to establish that he was treated unfairly in this matter.

With regard to his request for travel reimbursement, appellant submitted e-mails indicating that there was a delay in reimbursement. There was no evidence that the employing establishment acted abusively or in error with regard to this matter. Apart from appellant's allegation, there is no evidence regarding any time limitation or other policy by the employer pertaining to reimbursement of travel. There is insufficient evidence of error or abuse in the handling of this administrative matter and it is not a compensable factor of employment.

¹¹ *James E. Norris*, 52 ECAB 93 (2000).

¹² *K.W.*, 59 ECAB 271 (2007).

¹³ *Cynthia R. Harrill*, 55 ECAB 522 (2004).

¹⁴ *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

The Board has held that the assignment of work is an administrative function of a supervisor and, absent error or abuse, frustration at not being assigned what an employee may consider meaningful work is not a compensable factor of employment but is frustration from not being permitted the particular work desired.¹⁵ The Board has held that the assignment of work or the matter in which a supervisor exercises his or her discretion are administrative matters that generally fall outside the scope of the Act.¹⁶ Appellant challenged various aspects of Ms. Notah's supervision. He submitted an affidavit by Ms. Spencer wherein she challenged Ms. Notah's treatment of him with regard to assigning and correcting work assignments. However, the Board has recognized that a supervisor or manager must be allowed to make decisions or perform duties that employees will, at times, dislike. Mere disagreement or dislike of a supervisor's management decision will not be compensable absent evidence of error or abuse.¹⁷ Specifically, appellant contended that although he had a Ph.D. in sociology, Ms. Notah only allowed him to perform the duties of a position of statistician at the employing establishment only 10 percent of the time and that most of his assigned work was of a clerical level or graphic design/technician nature. Initially, the Board notes that she stated that he was in a training status. Furthermore, as Ms. Notah was appellant's supervisor, she had great discretion as to how to assign his work. Appellant has not shown that she acted abusively in making work assignments. He also objected to Ms. Notah "scolding" him for sending patients' name through an e-mail during a salmonella outbreak and that at other times reprimanded him for not sending an e-mail. Appellant also contended that he was not given the proper computer and software to perform his job. He also notes that Ms. Notah would come into his office and demand that he explain work he submitted weeks before. Appellant noted that she would assign him work and then change the project and blame him for doing the task incorrectly. However, these assertions also regard matters that were within his supervisor's discretion and the Board does not find that any error or abuse has been shown with regard to these matters.

There is some evidence in the record that appellant had a dispute with Atlas Moving Company with regard to moving his personal belongings when he moved to begin his position with the employing establishment. Ms. Notah noted that once the employing establishment became involved in the matter that it needed to be handled appropriately. The moving of appellant's personal and household items is not a compensable factor of employment in that it did not involve his work duties.

The Board further finds that certain allegations made by appellant are not established as factual. Appellant alleged that Ms. Notah was prejudiced towards older white men and was jealous of his happy marriage. He alleged that she repeatedly mocked and sneered at him for taking a full-hour lunch at home with his wife. Appellant made allegations that Ms. Notah treated him in a scornful and chiding manner and engaged in daily ridiculing, sneering, chiding and speaking to him disdainfully. He alleged that she engaged in a "systematic campaign of personal harassment" against him. Ms. Notah denied the above allegations. In support of his claim, appellant submitted affidavits by Ms. Spencer, Ms. Lucher and Ms. Chase. The affidavits

¹⁵ *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

¹⁶ *See Robert Knoke*, 51 ECAB 319 (2000); *Frank B. Gwozdz*, 50 ECAB 434 (1999).

¹⁷ *T.G.*, 58 ECAB 189 (2006).

of Ms. Lucher and Ms. Chase are not relevant to the allegations raised by appellant. Both Ms. Lucher and Ms. Chase were former secretaries for Ms. Notah and worked prior to when appellant commenced his employment on March 12, 2008. Ms. Lucher last worked on September 1, 2006 and Ms. Chase last worked in March 1996. Neither of these individuals had any personal knowledge of the incidents appellant described as leading to his emotional condition. Ms. Spencer did work with both Ms. Notah and appellant at the same time but made general allegations that she believed that he was treated unfairly or as a professional. She did not specify in detail any incidents of harassment.¹⁸ The Board finds that there is insufficient evidence to establish appellant's allegations of harassment and discrimination as factual. Therefore, these allegations are not deemed to be compensable employment factors.

The Board has also considered appellant's assertion that the Office erred in delaying its decision for over 90 days after his May 5, 2009 reconsideration request. The Board finds that although the Office's December 30, 2009 decision was issued over 90 days after he requested reconsideration, this did not prejudice his claim as the Office conducted a merit review.¹⁹ Appellant's right to have the Board review the merits of his allegations was not prejudiced.

Appellant has not established a compensable employment factor giving rise to her claimed emotional condition. Therefore, he did not meet his burden of proof.²⁰

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

¹⁸ See *M.D.*, 59 ECAB 211, 214 (2007).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002) (when the Office delays a reconsideration decision beyond 90 days and such delay jeopardizes the claimant's right to review of the merits of the case before the Board, it should conduct a merit review).

²⁰ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 30, 2009 is affirmed.

Issued: March 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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