

FACTUAL HISTORY

On May 24, 2010 appellant, then a 51-year-old information technology specialist, filed an occupational illness claim (Form CA-2) alleging that he sustained bipolar affective disorder as a result of his federal employment. He alleged that he was subject to discriminatory acts, errors and abuse. The reverse of the claim form noted that appellant stopped work on April 12, 2010.

Appellant submitted an undated statement on July 19, 2010 providing further allegations regarding his claim for compensation. He had been diagnosed with bipolar affective disorder since 1991 and the employing establishment accommodated his condition with a flexible work schedule. This changed in September 2008, when Bartow C. Tucker became his supervisor. Appellant alleged that he was subject to harassment and discrimination, as his accommodations were revoked and his schedule and duties were changed. He was asked for additional medical information and told that none was on file, even though he had previously submitted medical evidence. Appellant was also denied a promotion, subject to retaliation for filing and Equal Employment Opportunity (EEO) complaint regarding the promotion denial, his time accounting was improperly challenged, he was given unwarranted discipline and negative performance reviews and denied a request for leave donation. He filed an EEO complaint in late 2008 regarding the promotion denial and a second EEO action in 2009 for harassment and discrimination.

The record contains a May 21, 2010 statement from Mr. Tucker, who denied any discriminatory or abusive actions. The supervisor stated that appellant had excessive absences in 2009 and his job performance had declined. In a statement dated August 27, 2010, Douglas D. Verner, another supervisor, stated that appellant's work assignments did evolve after September 2008, as would be expected in a highly technical, often changing field. He stated that appellant was not selected for promotion because he was not the most qualified candidate. With respect to the need for additional medical documentation, the supervisor noted that appellant was provided two months to obtain the necessary documentation. Mr. Verner stated that appellant had been improperly recording his time and attendance and work outside the regular work schedule and duty station was not allowed without prior supervisory approval. He also noted that appellant had not met the requirements for the leave donation program. Mr. Verner stated that the employing establishment had continued to make accommodations for appellant, allowing him to telecommute two days a week, providing a starting time of 10:30 a.m. and granting extensions of projects.

On November 15, 2010 appellant submitted portions of deposition testimony in December 2009 with respect to an EEO complaint. Erica Kavanaugh of the employing establishment, stated that initially appellant's prior medical documentation could not be located as it was not in the alphabetized folder for appellant's name. The record contains a March 13, 2009 letter from Mr. Tucker to appellant, stating that based on workload changes he had requested in November 2008 appellant submit medical documentation regarding his condition. The supervisor noted that a physician had recommended appellant be able to telecommute three days a week, but based on his job duties and the needs of the office, a reasonable accommodation was two days per week of telecommuting.

By decision dated December 21, 2010, OWCP denied the claim for compensation. It found that no compensable work factors had been established.

Appellant requested a hearing before an OWCP hearing representative, which was held on May 11, 2011.

On May 9, 2011 OWCP received a settlement agreement dated November 19, 2010 with respect to appellant's EEO complaints. The employing establishment disputed that it engaged in discrimination against appellant and denied the allegations made in the EEO complaints. The agreement stated that appellant would be promoted to a nonsupervisory position retroactive to April 11, 2010. In addition, his performance appraisal for 2009 would be raised, any negative personnel actions or recommendations (such as suspension for time sheet irregularities) would be expunged and appellant agreed to resign from his employment effective December 3, 2010.

By decision dated September 22, 2011, the hearing representative affirmed the December 21, 2010 OWCP decision. The hearing representative found that appellant had not established a compensable work factor.

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.² This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.³ A claimant must also submit rationalized medical opinion evidence establishing a causal relationship between the claimed condition and the established, compensable work factors.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁵

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

⁴ *See Bonnie Goodman*, 50 ECAB 139, 141 (1998).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.⁶ Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.⁷

ANALYSIS

In the present case, appellant has alleged that he was subject to harassment and discrimination by the employing establishment. With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers, which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under FECA. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁸ The record contains a November 19, 2010 settlement agreement between appellant and the employing establishment with respect to EEO complaints filed. The settlement agreement does not contain any admission of harassment or discrimination by the employing establishment. The agreement specifically stated that the employing establishment disputed the allegations raised by appellant. Moreover, there is no probative evidence of record establishing harassment or discrimination, such as witness statements, administrative findings or other relevant evidence.

Appellant has raised a number of specific allegations of erroneous actions by the employing establishment. Even if harassment or discrimination is not established, a specific allegation of error or abuse may be considered a compensable work factor if the evidence demonstrates error or abuse in an administrative matter.⁹ With respect to the denial of a promotion, there was no evidence of error or abuse. The supervisor stated that appellant was not selected because he was not the most qualified candidate. The agreement to retroactively promote appellant to a nonsupervisory position does not establish error or abuse in itself. As noted above, there was no admission of error by the employing establishment. There was no probative evidence of error or abuse with respect to a denial of promotion. Appellant alleged that there were errors with respect to a lack of reasonable accommodation of his condition. But the evidence indicated that the employing establishment considered a physician's recommendation and also the nature of appellant's job duties and requirements. The employing establishment did attempt to accommodate appellant and there was no evidence of error or abuse regarding this allegation.

There was an allegation of error as to the handling of medical information and the requirements for medical documentation. There was no probative evidence of error or abuse in this regard. The supervisor indicated that current medical evidence was needed to substantiate any continuing accommodations due to the nature of appellant's job duties. Appellant referred to

⁶ See *Brian H. Derrick*, 51 ECAB 417, 421 (2000).

⁷ *Margreat Lublin*, 44 ECAB 945, 956 (1993).

⁸ *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

⁹ See *K.W.*, 59 ECAB 271 (2007).

disciplinary matters and performance appraisals, but the record contains no probative evidence of error or abuse. Again, the agreement modifying a disciplinary action or a performance review does not establish error or abuse in the absence of other evidence. The modification or rescission of an administrative action does not, in and of itself, establish error or abuse.¹⁰ In addition, there is no evidence of error or abuse regarding a request for leave donation. The employing establishment stated that appellant had not met the requirements for the leave donation program.

With respect to an allegation of error as to time accounting, appellant presented no evidence of error or abuse by the employing establishment. According to the employing establishment, he was improperly recording his work hours based on established policy. No probative evidence of error or abuse by the employing establishment was submitted.

Appellant also raised an allegation of retaliation for filing an EEO claim. He referred to coworkers talking about him with providing any additional detail or information. The Board finds no probative evidence to establish error of abuse in this regard.

Having reviewed the factual evidence of record, the Board finds that appellant has not established a compensable work factor with regard to the claim for compensation. There is no probative evidence of harassment, discrimination or retaliation. The specific allegations of error or abuse in an administrative matter have been reviewed and the Board finds no probative evidence of error or abuse. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.¹¹

On appeal, appellant's representative argues that appellant's condition was not self-generated and the evidence establishes error or abuse. Appellant's representative resubmitted portions of deposition testimony pursuant to the EEO proceedings and argued that the depositions document errors made in administrative, without further explanation.¹² The deposition testimony of record is incomplete and the portions submitted do not provide any admission or other probative evidence of error or abuse. The acknowledgement that it took time to find appellant's prior medical documentation, for example, does not rise to the level of erroneous or abusive action. The Board has reviewed all the evidence of record and finds, for the reasons noted above, that the evidence does not substantiate a compensable factor of employment. Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁰ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Richard J. Dube*, 42 ECAB 916 (1991) (reduction of a disciplinary letter to an official discussion did not constitute abusive or erroneous action by the employing establishment).

¹¹ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹² To the extent that any evidence submitted on appeal was not before OWCP at the time of the September 22, 2011 decision, that the Board cannot review new evidence on appeal. 20 C.F.R. § 501.2(c)(1).

CONCLUSION

The Board finds that appellant has not established an emotional condition causally related to compensable work factors.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 22, 2011 is affirmed.

Issued: October 16, 2012
Washington, DC

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

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

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