United States Department of Labor
Employees' Compensation Appeals Board

TONY AL-BESHRAWI, Appellant	)	
and	)	**Docket Nos. 04-115; 04-605; 04-992**
DEPARTMENT OF COMMERCE, PATENT & TRADEMARK OFFICE, Arlington, VA, Employer	)	**Issued: September 23, 2005**

Appearances:
Harold Levi, Esq., for the appellant
Jim C. Gordon, Esq., for the Director

Oral Argument Held May 19, 2005

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
A. PETER KANJORSKI, Alternate Judge

JURISDICTION

On October 3, 2003 appellant timely filed an appeal from a September 5, 2003 merit decision by the Office of Workers' Compensation Programs which denied modification of a June 18, 2003 decision denying his claim of a recurrence of disability due to a December 19, 2001 employment injury. The appeal was docketed as No. 04-115. On November 11, 2003 he timely filed an appeal from a July 10, 2003 decision denying his emotional condition claim. The appeal was docketed as No. 04-605. On February 2, 2004 appellant filed an appeal from a January 14, 2004 decision of an Office hearing representative who found that he had failed to establish injury on May 23, 2002 or July 16, 2002. The appeal was docketed as No. 04-992. The Board has jurisdiction over the merits of these claims pursuant to 20 C.F.R. §§ 501.2(c) and 501.3. The appeals were consolidated for oral argument before the Board.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability commencing June 2002 causally related to a December 19, 2001 employment injury; (2) whether he sustained an emotional condition arising in the performance of duty; and (3) whether appellant was injured

on May 23, 2002 or August 5, 2002 in the performance of duty at the time, place and in the manner alleged.

FACTUAL HISTORY: DOCKET NO. 04-115

On December 19, 2001 appellant, then a 36-year-old patent examiner, filed a claim after he tripped and fell on that day, striking the left side of his body and his right arm against a chair. He was treated that day at Kaiser Permanente for multiple contusions and muscle strain. Appellant stopped work on December 19, 2001 and was released for regular duty on January 3, 2002.

In a January 2, 2002 report, Dr. Celerino M. Magbuhos, a Board-certified internist, noted a history of injury and noted that x-rays of appellant's ribs and arms were normal. He indicated that appellant experienced persistent pain in the low back region with minimal radiation to the buttocks. Dr. Magbuhos noted that diagnostic tests were ordered. On January 13, 2002 a magnetic resonance imaging (MRI) scan of the lumbosacral spine was obtained which showed that the vertebral column alignment was intact. No significant disc narrowing or desiccation was seen and no significant disc bulge or herniation was identified at any level. There was no evidence of central canal or lateral recess stenosis. A January 14, 2002 diagnostic study was negative for pleural effusion, pneumothorax or rib fracture. The right forearm was reported as intact.

On June 10, 2002 the Office accepted appellant's claim for contusions of the ribs and right arm.

On August 28, 2002 appellant filed a recurrence of disability claim, contending that he intermittently stopped work in June and July for treatment of lower back pain which he attributed to the December 19, 2001 injury. He also noted that he experienced anxiety and depression as a result of harassment and intimidation by a supervisor and several coemployees.[1]

In support of his claim, appellant submitted the August 1, 2002 report of Dr. Hoda Makkawi, a physician at Kaiser Permanente, who noted that appellant had preexisting conditions of fibromyalgia, non-Hodgkin's lymphoma and sensory nerve damage. He stated that appellant was under a lot of stress at work, which had a negative influence on his preexisting conditions. He indicated that appellant was disabled from July 22 to August 23, 2002. In a note dated August 5, 2002, Dr. M-Wagdi M. Attia, a psychiatrist, excused appellant from work from August 5 to September 5, 2002 due to anxiety and depression "related to continuing harassment and intimidation at his workplace."[2] A July 18, 2002 treatment note indicated that appellant was seen in physical therapy for back and leg pain.

[1] Appellant's supervisor indicated that appellant was on a flexible schedule as of March 24, 2002 and had intermittently stopped work since May 24, 2002.

[2] Appellant also submitted copies of treatment notes from Kaiser Permanente. A June 11, 2002 note by Dr. Magbuhos noted appellant reported stress consisting of harassment and intimidation. Other notes of June and July addressed his complaints of stress arising at work, noting that he should be off work June 4 to 17, 2002.

By letter dated February 25, 2003, the Office advised appellant that the medical evidence of record was not sufficient to establish a recurrence of disability due to the December 19, 2001 employment injury. He was advised to present additional evidence to support his claim, including a medical narrative from a physician addressing the issue of causal relationship.

Appellant submitted a February 10, 2003 note from Dr. Ziad A. Akl, Board-certified in infectious disease, who stated: "[Appellant] suffers from chronic lower back pain and should be allowed to take a walk as needed." He also submitted medical evidence of acupuncture treatment for low back pain and intermittent treatment notes from Kaiser Permanente. In a March 23, 2003 letter, appellant's attorney indicated that a narrative medical report would be forthcoming.

In a report dated March 27, 2003, Dr. Virgil A. Balint, Board-certified in physical medicine and rehabilitation, stated that he evaluated appellant on March 20, 2003 for complaints of low back pain. He reviewed a history of injury and medical treatment. Dr. Balint noted that appellant had no complaints with regard to his rib or hand, which he characterized as having resolved. He described radiculopathy more pronounced on the right than the left down the buttock to the back of the thighs. Dr. Balint diagnosed right iliolumbar ligament sprain/strain and recommended physical therapy and a cortisone injection.

On March 19, 2003 Dr. Akl reported that he first treated appellant on February 10, 2003 for intermittent pain to the middle of his back. He stated that physical examination was unremarkable and noted the negative diagnostic studies. Dr. Akl referred appellant to an orthopedic surgeon who performed x-rays which showed normal lumbar alignment with no significant degenerative changes, spondylolisthesis or spondylolysis. A bone scan was also reported as negative for abnormality. Appellant was prescribed medication and a course of physical therapy. Dr. William C. Lennen, an orthopedic surgeon, submitted several medical reports pertaining to his treatment of appellant. On May 22, 2003 he stated that an MRI was obtained which revealed no significant herniated disc or lesion compressing either the spinal cord or nerve roots. He could find no anatomic reason for appellant's complaints of pain.

By decision dated June 18, 2003, the Office denied appellant's recurrence of disability claim. It found that the medical evidence of record did not provide sufficient rationale regarding the relationship of his current back condition to the December 19, 2001 employment injury.

Appellant, through his attorney, requested reconsideration and submitted additional medical evidence, including treatment notes and disability certificates from Dr. Ramin M. Jebraili, who noted that appellant's symptoms were consistent with sacroiliitis and had relief with cortisone injections. In notes dated April 21 and June 16, 2003, Dr. Akl noted that appellant was seen in treatment for chronic back pain and should be excused from work until further notice.

On September 5, 2003 the Office denied modification of the June 18, 2003 decision. The Office noted that the physicians of record provided accounts of appellant's symptoms and treatment but did not provide a medical opinion on how the current medical conditions were causally related to the December 19, 2001 employment injury.

LEGAL PRECEDENT: DOCKET NO. 04-115

An individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable and probative medical evidence that the disability for which compensation is claimed is causally related to the accepted injury.[3] As part of this burden of proof, the employee must submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related injury and supports that conclusion with sound medical reasoning.[4] Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[5]

A recurrence of disability is defined under the Office's implementing federal regulations to mean the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6]

ANALYSIS: DOCKET NO. 04-115

Appellant sustained injury on December 19, 2001 when he tripped and fell, striking his body against a chair. His claim was accepted by the Office for contusions of the ribs and right arm. Appellant returned to regular duty on January 3, 2002. The medical evidence of record reflects that appellant continued to receive intermittent treatment for low back complaints at Kaiser Permanente. The Board notes, however, that the Office did not accept a low back condition as causally related to the December 19, 2001 employment injury.

Dr. Magbuhos reported on January 2, 2002 that appellant's ribs and arm were normal and were not disabling. Due to appellant's complaints of low back pain, various diagnostic tests were obtained. A January 13, 2002 MRI of the lumbosacral spine showed an intact vertebral column with no significant disc narrowing or disc herniation and no central canal or lateral recess stenosis. Appellant underwent acupuncture and cortisone injections for intermittent back pain, but the physicians of record noted unremarkable physical examinations and diagnostic tests. Dr. Akl noted normal lumbar alignment with no significant degenerative changes, spondylolisthesis or spondylolysis. Dr. Lennen obtained an MRI which did not reveal a herniated disc or lesion of the spinal cord or nerve roots. He noted there was no anatomic explanation for appellant's low back complaints.

Appellant was requested by the Office to submit a medical report from an attending physician which included an opinion relating his low back complaints to the December 19, 2001 employment injury. This he failed to provide. The treatment notes from the various physicians

[3] *See Ronald C. Hand*, 49 ECAB 113 (1997).

[4] *See Bernard Snowden*, 49 ECAB 144 (1997).

[5] *See Michael E. Smith*, 50 ECAB 313 (1999).

[6] 20 C.F.R. § 10.5(x).

associated with Kaiser Permanente do not present a well-rationalized explanation of how appellant's low back symptoms or complaints were caused or aggravated by the accepted injury. None of the reports submitted to the record provide a narrative opinion based on a complete and accurate factual and medical background explaining the nature of the relationship between appellant's various diagnoses and the December 19, 2001 employment injury.[7] While several physicians noted that appellant should be excused from work for various periods, their reports did not address how appellant's disability was caused or contributed to by the accepted contusions to his ribs and right arm. Factors that comprise the evaluation of medical opinion evidence include the opportunity for and thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's stated conclusions.[8] Applying this standard, the Board finds that the medical evidence in this case is insufficient to establish that appellant had any disability after January 3, 2002 or need for medical treatment causally related to the December 19, 2001 employment injury. He has not met his burden of proof to establish a recurrence of disability or need for medical treatment related to the accepted contusions.

FACTUAL HISTORY: DOCKET NO. 04-605

On May 20, 2003 appellant filed a claim for stress, which he attributed to threats, insults, discrimination and racism by Stephen Chin and Jim Ng. He listed the date of injury as September 6, 2001 and indicated that the employing establishment had knowledge of an incident on September 21, 2001 and that he had filed an Equal Employment Opportunity (EEO) complaint on October 5, 2001. The employing establishment controverted the claim. Appellant submitted the December 21, 2001 report of Dr. Magbuhos, who noted that appellant had been treated at Kaiser Permanente for worsening generalized muscle and joint pains and low-grade fever associated with an exacerbation of fibromyalgia secondary to stress at work. Dr. Magbuhos listed the dates of medical treatment from September 13 to December 19, 2001, noting that appellant was advised to leave work until his symptoms improved.

By letter dated May 30, 2003, the Office requested that appellant submit additional factual and medical evidence in support of his claim. He was asked to describe in detail the employment conditions or factors to which he attributed his emotional condition and to provide a medical report providing the details as to his treatment and an opinion on causal relationship.

On June 10, 2003 counsel for appellant submitted a declaration dated November 22, 2002 from William A. Luther, Jr., a coworker. He stated that he was present with appellant at a meeting on July 23, 2002 in the office of human resources at which appellant inquired about the denial of continuation of pay and a CA-1 submitted on or about July 9, 2002. Appellant contended at the meeting that human resources personnel had not properly advised him of his right to file a Federal Employees' Compensation Act claim, and had effectively concealed facts related to a May 23, 2002 incident.

[7] *See Allan C. Hundley*, 53 ECAB 551 (2002).

[8] *See Anna M. Delaney*, 53 ECAB 384 (2002).

In a July 10, 2003 decision, the Office denied appellant's emotional condition claim. The Office noted that the evidence submitted from Mr. Luther was insufficient to establish a specific compensable factor and that no medical evidence was submitted which provided a diagnosis connected with any claimed event.

LEGAL PRECEDENT: DOCKET NO. 04-605

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[9] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act. In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties.

To the extent that disputes or incidents are characterized as constituting harassment or discrimination by supervisors or coworkers, there must be evidence that such harassment or discrimination did in fact occur. Mere perceptions of such conduct are not compensable.[10] In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[11] Moreover, the Board has noted that the processing of claims for workers' compensation benefits bears no relation to an employee's day-to-day work duties and matters pertaining to the processing of such claims by the employing establishment are, generally, not employment factors under the Act.[12]

ANALYSIS: DOCKET NO. 04-605

The Board notes that appellant has not submitted a sufficient description of the incidents and events at work to which he attributed his emotional condition or stress. The claim form filed on May 20, 2003 cited generally to threats, discrimination and racism by Mr. Chin and Mr. Ng and listed the date of injury as September 6, 2001. There was no accompanying explanation from appellant which provided more specific detail as to the nature of the alleged activities, the times or dates on which such events took place, or the manner of any interactions he had with the named individuals. Appellant was requested by the Office to provide a more specific description

[9] *Lillian Cutler*, 28 ECAB 125 (1976).

[10] *See Kim Nguyen*, 53 ECAB 127 (2001); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[11] *See Michael A. Deas*, 53 ECAB 208 (2001).

[12] *See Thomas J. Costello*, 43 ECAB 951 (1992); *George A. Ross*, 43 ECAB 346 (1991).

of the employment conditions to which he attributed his claim. In response, his attorney submitted a November 22, 2002 declaration from Mr. Luther. However, he did not describe any events or incidents pertaining to the individuals listed on appellant's claim form. Rather, he generally described a meeting on June 23, 2002 between appellant and the human resources department pertaining to the processing of a workers' compensation claim. As noted, the processing of a claim for workers' compensation does not pertain to an employee's regular or specially assigned duties and is not a compensable factor of employment.

Appellant made a general reference to an EEO complaint on his claim form. However, he did not provide any specific information identifying his employment relationship with Mr. Chin or Mr. Ng or any statement from a witness as to his interactions with these individuals. Unsubstantiated allegations of harassment or discrimination are not proof that such incidents occurred. A claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[13] Given the lack of evidence associated with this claim, the Board must find that appellant has failed to establish a compensable factor of employment.

Moreover, the medical report from Dr. Magbuhos did not provide any specific diagnosis of an emotional condition, other than indicating that appellant had fibromyalgia secondary to stress at work. The physician did not provide any description of the nature of the stresses encountered by appellant or any opinion on causal relationship. For these reasons, the Board finds that appellant has not met his burden of proof in this case.

FACTUAL HISTORY: DOCKET NO. 04-992

On July 9, 2002 appellant filed a claim for stress which affected his preexisting conditions. He alleged harassment, intimidation, discrimination and retaliation by several employees during the prior 10 to 11 months. He stated that his injury occurred on May 23, 2002. Appellant stopped work on May 24, 2002 and returned intermittently as of June 3, 2002.

By letter dated August 5, 2002, the Office advised appellant to submit additional evidence in support of his claim. It was requested that he provide a specific description of the employment incidents to which he attributed his emotional condition and medical evidence from a physician addressing his treatment and an opinion on causal relationship.

In an August 1, 2002 report, Dr. Makkawi stated that appellant was being treated at Kaiser Permanente for the preexisting conditions of fibromyalgia, non-Hodgkin's lymphoma and sensory nerve damage. He noted: "The patient has been under a lot of stress at work, which can have a negative influence on his preexisting condition of non-Hodgkin's lymphoma." Dr. Makkawi indicated that work could aggravate fibromyalgia and that appellant needed to be away from work for one month, July 22 through August 23, 2002.

On September 4, 2002 appellant's attorney stated that the stress from harassment and retaliation by appellant's superior and coworkers had exacerbated his fibromyalgia and lymphoma. Counsel indicated that appellant was becoming fearful of going to work because of

[13] *See Sherman Howard*, 51 ECAB 387 (2000).

the unpredictable behavior of his supervisor and coworkers. He related that the harassment and retaliation had been documented. Counsel alleged that appellant had pictures showing a spy camera placed in his office, which was subsequently removed. He reported that appellant had saved messages left on his office voice mail which involved spitting and flatulence on a message machine. Counsel alleged that coworkers would refer to appellant as "camel jockey," "Lebanese jackass" and "you piece of shit." The attorney claimed that there was documentation that appellant's supervisors instigated other employees to gang up on him, steal his files and chair, spit on and threaten him. He stated that this harassment began in August 2001, increased after September 11, 2002 and continued.

In support of the claim, appellant submitted treatment notes of July 18 and 29, 2002 from Kaiser Permanente. These address physical therapy for low back pain. Disability certificates were also submitted. Dr. Magbuhos stated: "This is issued to support the medical leave applied by [appellant] from June 4 to 17, 2002 due to significant work-related stress affecting his medical condition." The second certificate, from a physician whose signature is illegible, listed disability from June 3 to 17, 2002.

In a September 13, 2002 decision, the Office denied appellant's claim on the grounds that the evidence of record did not establish that he sustained an injury on May 23, 2002, as alleged. The Office stated that appellant had failed to submit evidence that included specific descriptions of the alleged employment incidents which listed the time, place and the manner of alleged events.

Appellant requested a hearing before an Office hearing representative. Prior to the hearing, appellant submitted numerous documents. In a November 21, 2001 email, Mr. Chin, a supervisor, stated that on August 31, 2001 appellant requested to attend a graduate course on finance for engineers. He approved the request and forwarded it to his supervisor, Mr. Ng, for signature. However, Mr. Ng denied the request because the course would not enhance the skills or improve the knowledge for appellant's job performance. On September 10, 2002 Mr. Chin gave appellant a letter explaining why the training request was denied. He stated that appellant refused to acknowledge the letter and wanted to pursue the matter with up-line superiors. Mr. Chin advised appellant to comply with the decision and mentioned another examiner of Lebanese descent who was fired for not complying with rules and regulations. Mr. Chin stated that he then apologized to appellant for mentioning this other examiner, as appellant might perceive it as a threat.

Mr. Chin described an incident on September 27, 2001 when appellant had a disagreement with Lamont McLauchlin about a locked door to a third floor suite. He indicated that appellant threatened Mr. McLauchlin from the hallway and invited him outside to flight. Mr. Chin stated that he discussed this matter with a superior to resolve the matter without it going further, but that Mr. McLauchlin wanted to file a formal complaint. On October 3, 2001 Mr. Chin and a superior reported the incident to Directors James Dwyer and Mr. Ng and asked for consultation. Mr. Chin indicated that he apologized to appellant for not keeping him informed of the progress of the incident.

In a January 23, 2002 memorandum, David Lugo, a coworker, stated that, during the months of September, October and November 2001, there occurred several instances when he

and appellant, his office mate, would come to work in the morning and found the office door locked. Each denied that they locked the office door at night. He also related that, on several occasions, someone would knock on the office door when appellant and Mr. Lugo were in, but when one of them answered the door, no one was there. Mr. Lugo stated that the incidents caused him and appellant to lock their office door at all times to deter the events.

In an August 5, 2002 statement, Phillip Klemmer indicated that he had heard four or five telephone messages left for appellant, consisting of sounds instead of words, including spitting, belching, passing gas and whistling. Appellant was advised that he could contact the telephone company to trace any telephone numbers if such messages continued. Also submitted was the November 22, 2002 declaration of Mr. Luther, as noted, which addressed a July 23, 2002 meeting between appellant and the human resources office. Appellant also submitted additional medical reports from Kaiser Permanente.

The record contains the May 23, 2002 report of an employing establishment security guard who responded to a theft call from appellant. Appellant reported that he and his office mate had not spoken to one another for approximately 20 days. He went to a doctor's appointment earlier that day and, when he returned to his office, noticed that one of his chairs was missing. Appellant asked Mr. Lugo what happened and was told that someone had taken it out of the office to use. Mr. Lugo did not know where the chair was taken. He became upset and left the office for the day.

A hearing was held on April 29, 2003, at which appellant appeared and provided testimony. Counsel contended that appellant experienced harassment from coworkers following September 11, 2001 based on his middle-east ancestry and had filed an EEO complaint which was not properly adjudicated. He reiterated that appellant's superiors condoned harassment of appellant and did not properly complete claim forms submitted, which resulted in the denial of continuation of pay. Appellant described the denial of his request for training and indicated that he wanted a written justification for the employing establishment's action. He alleged that Mr. Chin, his supervisor, offered to give him time off instead and yelled at him when appellant refused the offer. Appellant testified that on one occasion the door to his office was jammed and that it took repairmen several hours to fix the door. He stated that messages were left on his message machine and cell phone with rude noises, which were reported to the EEO Commission. Counsel reiterated that appellant was sometimes called names. He stated there were a lot of Asians in appellant's unit and he was unsure if they were trying to get rid of appellant in order to secure work for others.

In an October 28, 2003 memorandum, David Robertson of the Patent Office Professional Association stated that the relationship between appellant and his supervisor had deteriorated to the point that his supervisor would refer him to the group director, Mr. Ng, who would then tell appellant to follow the chain of command, starting with his supervisor. Mr. Robertson alleged that appellant's supervisors had made derogatory and discriminating remarks to appellant over the prior two years. He reported that, on October 6, 2003, in the presence of two witnesses from the association, appellant's current supervisor made invidious remarks regarding appellant's religion. The next day a supervisor made a derisive remark about the cross that appellant was wearing.

The record contains correspondence between appellant's counsel and the Office pertaining to the adjudication of appellant's claims for compensation. This correspondence reflects that appellant filed an emotional condition claim on August 5, 2002 for an incident occurring on July 16, 2002 which was adjudicated and denied by the Office under claim number 25-2018865. A second hearing before an Office hearing representative had been scheduled for June 26, 2003 on this claim, but was cancelled as it was determined that appellant was, in fact, claiming an occupational disease and the alleged incidents could be addressed in a decision following the April 29, 2003 hearing. Counsel objected to the treatment of the claims as an occupational disease, stating, "we believe that the claims are two separate claims of two separate incidents," and that the Office should proceed to adjudicate the claims as traumatic injuries. In a January 13, 2004 memorandum, the hearing representative noted that the two claims would be doubled and a decision issued addressing both claims.

The record was supplemented with the traumatic injury claim filed by appellant on August 5, 2002 for anxiety and depression attributed to harassment, intimidation, abuse and retaliation by several employees. In support of the claim, appellant submitted treatment notes from Kaiser Permanente dated August 5 and 6, 2002, noting that he would be disabled for a month due to anxiety, stress, back pain and abdominal pain. By letter dated August 20, 2002, the workers' compensation program manager for the employing establishment noted that the claim had been submitted to the Office and that, on August 6, 2002, appellant had been advised to submit a notice of occupational disease. The employing establishment noted that it controverted the claim and continuation of pay. Additional medical records from Kaiser Permanente were submitted to the record. On September 27, 2002 the Office advised appellant to submit additional factual and medical evidence in support of his claim. In a decision dated November 8, 2002, the Office denied appellant's claim finding that he failed to establish injury on August 5, 2002. An oral hearing request was made; however, as noted, this claim was combined with the emotional condition claim of May 23, 2002.

In a January 14, 2004 decision, the Office hearing representative denied appellant's claim of injury on May 23 and July 16, 2002. He found that appellant failed to describe any specific incident or event as occurring on May 23 or July 16, 2002, such that there were no compensable factors of employment established.

LEGAL PRECEDENT: DOCKET NO. 04-992

A traumatic injury is defined under the Office's implementing federal regulations as a condition of the body caused by a specific event or incident, or a series of events of incidents, within a single workday or shift.[14] This is distinguished from an occupational disease or illness, which is a condition produced by the work environment over a period of time longer than a single workday or shift.[15] The Board has noted that in determining the form and scope of a claim, the allegations set forth by a claimant are as much a part of the claim as the contentions made on the claim form itself.[16]

[14] 20 C.F.R. § 10.5(ee)

[15] 20 C.F.R. § 10.5(q).

[16] *See Joseph J. Arseneau*, 14 ECAB 245 (1963).

ANALYSIS: DOCKET NO. 04-992

The Board notes, initially, that counsel for appellant is in error by contending that appellant simply alleged traumatic injuries of May 23 and August 5, 2002. The evidence reflects appellant's multiple allegations of harassment and retaliation extending to periods of time well beyond these two workdays or shifts. The claim form of July 9, 2002 specifically alleged harassment and retaliation by coworkers for the 10 to 11 months prior to the date it was filed. Appellant made substantially similar allegations with the filing of the August 5, 2002 claim.[17] In a September 4, 2002 letter, counsel contended that appellant had become fearful of going to work because of the behavior of his supervisors and coworkers, noting that harassment first began in August 2001 and was continuing. This contradicts his argument before the Branch of Hearings and Review that the claims were traumatic in form and scope. For this reason, the Board finds that the claims filed by appellant are properly ones for occupational disease.

The only event of May 23, 2002 described in the case record is the incident in which a chair was removed from appellant's office. The report of the security guard noted that appellant attended a doctor's appointment that day and returned to his office and found a chair missing. An office mate noted that someone had removed the chair and he did not know where it was taken. For harassment or discrimination to give rise to a compensable disability, there must be evidence that such conduct did, in fact, occur. Mere perceptions or feelings of harassment or discrimination do not constitute a compensable factor of employment.[18] Appellant claimed that this action constituted harassment. While the evidence of record reflects that a chair was moved, it is not sufficient to establish that the removal of the chair constituted harassment by his coworkers or supervisors. He has not established a compensable factor in this regard.

Appellant never provided a detailed statement pertaining to the alleged employment factors; rather, most allegations were portrayed by counsel or memoranda submitted to the record. There is no description of specific employment incidents on July 16 or August 5, 2002. It was contended that appellant's supervisors condoned harassment and verbal abuse of appellant by his coworkers. The Board had recognized that verbal abuse or the use of epithets in the workplace, are compensable under certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[19] Again, mere perceptions of harassment or discrimination will not support an award of compensation; there must be reliable and probative evidence that establishes a factual basis for the allegations.[20] The Board finds that appellant has not submitted sufficient evidence to the record to substantiate that he was called names, as alleged, or that his supervisors condoned a pattern of harassment by his coworkers. The statement of Mr. Robertson does not provide sufficient detail as to the nature of any comments directed towards appellant. His memorandum is very general in nature and does not identify the

[17] It appears the argument for traumatic injury has been premised, in part, on appellant's request for continuation of pay. To be eligible for continuation of pay, an employee must have a sustained a "traumatic injury" as defined under the regulations. *See* 20 C.F.R. § 10.205(a).

[18] *See Bonnie Goodman*, 50 ECAB 139 (1998).

[19] *See Marguerite J. Toland*, 52 ECAB 294 (2001).

[20] *See Ruth C. Borden*, 43 ECAB 146 (1991).

date, time, places or individuals involved or the specifics of any comments made which were derogatory or discriminatory in nature. Mr. Klemmer's statement generally noted that he overheard four or five messages on an answering machine containing various noises. There is insufficient evidence on which to conclude that any such messages, even if accepted as factual, were left by appellant's coworkers or supervisors. Counsel for appellant was more explicit in describing certain epithets, contending that the name calling and harassment by coworkers and supervisors had been adequately documented for the record. The Board respectfully disagrees. The evidence submitted does not adequately identify those individuals who allegedly made any such remarks, the time or dates of such occurrences or the circumstances under which they arose. The email of Mr. Chin does not reflect any epithets or verbal abuse directed towards appellant.

Mr. Chin described an incident of September 27, 2001 in which appellant had a disagreement with a coworker about a locked door. The memorandum of Mr. Lugo noted that there were instances in which he or appellant found that the door to their office had been locked. Appellant testified at the hearing that on one occasion the door to his office became jammed and it took several hours for it to be repaired. These statements are not sufficient to support a finding that the door to appellant's office was routinely locked or jammed as a form of harassment directed towards him. This evidence does not substantiate that Mr. McLauchlin ever locked appellant out of an office suite or that other employees routinely locked the door or caused it to become jammed.

Mr. Chin did describe how appellant's request to attend a graduate training course was ultimately denied by Mr. Ng, an up-line supervisor. The Board notes that the denial of appellant's request to attend a graduate training course is an administrative determination which, absent evidence of error or abuse, is not a compensable factor of employment.[21] An employee's own feeling that a certain management decision is unjustified is self-generated and does not give rise to coverage under the Act absent error or abuse. This recognizes that a supervisor or manager will, at times, make decisions which the employee dislikes or finds inconvenient. Mere dislike or disagreement with a supervisory or management decision is not compensable without a showing that the action complained of was unreasonable or in error.[22] The evidence of record is insufficient to establish that Mr. Ng's decision to deny appellant's request was unreasonable or abusive. While appellant was certainly disappointed in this response to his request, the evidence does not establish that the decision was reached in an abusive manner or as a form of harassment.

Appellant noted that he had filed EEO complaints and had an action pending in court. The Board notes there has been no evidence introduced to the record of any factual findings pertaining to his allegations by the EEO Commission. The Board had held that grievances and EEO complaints, by themselves, to not establish workplace harassment or unfair treatment.[23] He also alleged error by management in the processing of his workers' compensation claim, noting the fact that he did not receive continuation of pay. As noted, the Board has held that these matters are not related to an employee's regular or specially assigned duties and bear no

[21] *See Mildred D. Thomas*, 42 ECAB 888 (1991).

[22] *See Constance I. Galbreath*, 49 ECAB 401 (1998).

[23] *Id*.

relationship to the employment. As such, these are not compensable factors of employment arising out of the performance of duty.

The Board finds that the Office properly denied appellant's claims. The factors alleged in this case render the form and scope of the claim as one of occupational disease. The evidence submitted in this case is insufficient to establish appellant's perceptions of harassment or discrimination by his supervisors or coworkers as factual. For this reason, he has failed to establish a compensable factor of employment.

CONCLUSION

The Board finds that appellant has not established a recurrence of disability due to a December 19, 2001 employment injury; he did not establish that he sustained an emotional condition causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs, dated January 14, 2004, September 5 and July 10, 2003 are affirmed, as modified.[24]

Issued: September 23, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[24] A. Peter Kanjorski, who participated at oral argument, retired from the Board on August 31, 2005 and did not participate in the preparation of this decision.