

employment. He stated that he first became aware of this condition on January 9, 2006 and that on March 6, 2006 he realized that his work had caused or aggravated the condition. Specifically, appellant attributed his depression to the failure to be selected for promotion to the position of Anti-Money Laundering Examiner and to retaliation by the employing establishment after filing an Equal Employment Opportunity (EEO) complaint for racial discrimination for his nonselection. He also noted that he had initially filed a Form CA-2a or recurrence of disability claim on March 6, 2006,¹ but decided after research that a CA-2 form or occupational disease claim was more appropriate.

In support of his claim appellant submitted a January 9, 2006 report by Dr. Sean Zielinski, Ph.D., licensed clinical psychologist and a statement detailing employment factors he believed caused or aggravated his condition. Dr. Zielinski diagnosed chronic and severe dysthymic disorder and opined that appellant was currently totally disabled. Appellant, in his statement attributed his depression to the failure of the employing establishment to promote him on two occasions, which he attributed to racial discrimination. He also claimed that he had not been properly compensated for performing higher grade work duties. Next, appellant makes general allegations of discriminatory administrative actions and retaliation.

Subsequently, appellant submitted additional medical and factual information including reports dated March 24 and June 15, 2006 by Dr. Mojtaba R. Molagh, a treating Board-certified psychiatrist; reports dated March 3, April 5 and June 13, 2006 and a March 2006 statement by Dr. Zielinski; and a June 11, 2006 letter acknowledging receipt for appellant's December 12, 2005 discrimination complaint.

On March 3, 2006 Dr. Zielinski diagnosed chronic dysthymic disorder, job stress and situation stress reaction.

On March 24, 2006 Dr. Molagh noted that appellant attributed his anger and depression to unfair treatment by his prior employer in 1994. He diagnosed adjustment disorder with mixed emotions and noted that appellant "is preoccupied with stressful job situation." In concluding, Dr. Molagh related that appellant was "apparently responding to adverse circumstances on his job, which is felt unfair to him."

Dr. Zielinski, in an April 5, 2006 report, diagnosed dysthymic disorder which currently was incapacitating appellant from performing his duties at the employing establishment.

A May 11, 2006 letter summarized appellant's discrimination complaint, which included the following allegations:

"(1) On or about November 1, 2005 [appellant] was not selected for the position of Internal Revenue Agent (AML Examiner) GS-512-12, advertised under the Agency's Vacancy Announcement Number 50-52-SP50889B;

¹ This was assigned claim number 13-0969336 with January 30, 1990 listed as the date of original injury.

“(2) On or about January 10, 2006 [appellant’s] request for 478 hours of sick leave was not approved, despite the fact that he provided medical documentation with his request;

“(3) On January 18, 2006 [appellant’s] supervisor issued him a [m]emorandum advising him in that he would have to sign the Federal Occupational Health Authorization for Disclosure of Information, so that his sick leave could be processed;

“(4) On February 2, 2006 [appellant’s] supervisor directed him to waive his statutory rights and to fully comply with the instructions issued by the examiner who was conducting an examination of his tax returns;

“(5) On February 23, 2006 [appellant’s] supervisor directed him to report for duty on Monday, February 27, 2006 or be charged absence without leave (AWOL) if he did not provide acceptable medical documentation and did not sign the attached ‘Authorization for Disclosure Information;’

“(6) On or about February 27, 2006 [appellant’s] prior supervisor issued him an inaccurate performance appraisal;

“(7) On February 27 and March 14, 2006 [appellant’s] prior supervisor refused to meet with him to discuss his performance appraisal;

“(8) On February 28, 2006 [appellant’s] supervisor directed him to provide confidential medical information and documentation by March 10, 2006;

“(9) On February 28, 2006 [appellant’s] supervisor reclassified his time and attendance reports to reflect all sick leave, instead of the combination of sick leave, direct and indirect time charged and approved since February 9, 2006, including official time he spent on the instant EEO complaint;

“(10) On March 9, 2006 [appellant’s] supervisor directed him to submit written requests for approval prior to any time and attendance changes to his sick leave status;

“(11) On March 9, 2006 [appellant’s] supervisor refused to direct his communications and directions to his NTEU representative or his physician or requested he provide him with his EEO contact point; and

“(12) On May 3, 2006 [appellant’s] supervisor denied his request to be compensated for higher graded duties perform in 2004 and 2005.”

On June 13, 2006 Dr. Zielinski diagnosed severe chronic dysthymic disorder and opined that appellant was totally disabled due to this condition. Appellant informed Dr. Zielinski that he “tried to make a go of it at the IRS [Internal Revenue Service] but the administrative procedures are too stressful” and that he was unable to “handle the tremendous stress that all the administrative procedures put me under.” Dr. Zielinski, in response to appellant’s March 10,

2006 letter requesting him to “amend the progress notes to include my current symptoms” which appellant stated that he attributed to his “being subjected to *unfair administrative procedures*” by the employing establishment, stated he had read and agreed with appellant’s statements in the letter. (Emphasis in the original.)

Dr. Molagh, in a June 15, 2006 report, noted that appellant continued to suffer from chronic severe depression. Appellant related that he had attempted to return to work, but was unable to “handle the stress that all the administrative procedures put me under.”

In a letter dated October 18, 2006, the Office informed appellant the information submitted was insufficient to support his claim and advised him regarding the medical and factual information required to support his claim.

In response to the Office’s request, appellant submitted factual and medical information including a January 9, 2006 report by Dr Zielinski, copies of e-mails, memorandum from his supervisor a copy of a January 10, 2006 request to use 478 hours of accrued sick leave under the Family Medical Leave Act for the period January 10 to April 7, 2006 and his statement.

On January 9, 2006 Shirley A. Snider, supervisory revenue agent, responded to an e-mail request from appellant that she consider his self-assessment when writing his appraisal. Ms. Snider indicated that she would consider his self-assessment in his evaluation and that she was informed his “promotion was effective as of Jan[uary] 8, [2006.]” She also informed him that she was “working on the paperwork to get you the pay for the over grade work.”

In a January 11, 2006 memorandum regarding pay for over grade work by appellant, Ms. Snider requested back pay for appellant performing Grade 12 work “for 120 days in 2004 and 120 days in 2005” when he was a Grade 11.

Appellant submitted various e-mails he sent regarding the status and use of his sick leave and a request to sign a Federal Occupational Health Authorization (FOHA). In a January 20, 2006 e-mail, he questioned his supervisor’s delay in approving his sick leave request as he contends that he provided supporting medical documentations. Appellant also noted that he declined to authorize release of his medical information under the FOHA for disclosure that his supervisor requested he sign. He noted on his January 23, 2006 e-mail that his supervisor had informed him that approval of his use of sick leave will be done “on a day by day basis until he gets word back from IRS medical.” In a February 27, 2006 e-mail, appellant noted that he was consenting to release his medical information in light of the directive he received to return to work.

In a January 18, 2006 memorandum, regarding appellant’s request for sick leave, Herman F. Moeller, Group Manager, informed him that in order to process his request that he needed to complete and return a FOHA for disclosure of information form within five business days.

In a February 2, 2006 memorandum, appellant was directed by Mr. Moeller, to “*immediately* cooperate with the examiner” regarding his federal income tax returns for the years 2000 through 2003. Mr. Moeller also directed appellant to authorize and sign “consent to extend the statute of limitations for all tax years as requested by the examiner.”

Ms. Snider, in a February 27, 2006 e-mail, informed appellant to talk to Mr. Moeller regarding his performance appraisal as she had given his files and information to Mr. Moeller.

On February 28, 2006 Mr. Moeller informed appellant that his time and attendance record had been corrected to reflect sick leave instead of the activity codes he used. In support of his decision to correct appellant's time and attendance record, he noted that appellant has "been on approved sick leave since January 9, 2006 and you are not in a regular work status."

In a March 10, 2006 letter, appellant requested Dr. Zielinski to provide additional information and requested he "amend the progress notes to include my current symptoms that resulted from my belief that [he] was subjected to *unfair administrative procedure*" at the employing establishment and listed his symptoms. Dr. Zielinski stated that he concurred "with the above symptomology for [appellant]."

Ms. Snider, in a March 15, 2006 e-mail, informed appellant to talk to Mr. Moeller if he did not agree with his performance appraisal ratings.

In a March 17, 2006 memorandum from Mr. Moeller appellant was informed that any changes to his sick leave use requires prior notification to his supervisor as he was on approved extended sick leave. He informed appellant that as of the date of the memorandum he was "directed to [Mr. Moeller], for prior approval, any changes to your sick leave status, you intend to make." Any request was to indicate the type of leave used, the amount of time and to be in writing. Appellant was informed that any failure to comply with "this directive may lead to disciplinary action, up to and including removal."

On October 28, 2006 appellant noted that he recently requested a hearing before an EEO administrative law judge regarding his discrimination claims based on race and disability and for retaliation. Next, he noted that he became very depressed November 2005 when he was again denied a promotion to a GS-12 due to race discrimination and reprisal. Appellant then stated that he had been informed of his selection "for promotion to GS-0512-12 in General Program," but "was not told when [he] would be reassigned to [Mr.] Moeller's ('Moeller') group." As no information as to the date of his reassignment was given, appellant stated that he submitted a request for sick leave on January 10, 2006 to Ms. Snider, his former supervisor. Appellant alleged that his condition was aggravated when Mr. Moeller refused to approve his sick leave and informed him that approval would be considered daily until "he received word back from IRS medical." He alleged that Mr. Moeller's request to sign a FOHA request is "discriminatory on its face" as it "permits the [f]ederal employer unlimited access to confidential medical information" which he contends "disadvantages employees with disabilities." As to the tax audit, appellant contends Mr. Moeller's memoranda were not part of the normal process and that he had been complying with the audit. Next, he alleges that Ms. Snider, his former supervisor, provided an inaccurate performance appraisal and that she failed to issue it in a timely fashion. Appellant alleged that his supervisor informed him that his "appraisal would improve significantly after [he] performed higher level-duties," but his rating did not change. He also contends that his rating for workgroup involvement, written communications and completion of assignments were incorrectly rated as "meets" when they should have been rated as "exceeds." Next, he alleged he requested to meet with Ms. Snider to discuss his self-assessment prior to his performance appraisal, but she refused to meet with him. Appellant alleged that due to

Ms. Snider's refusals to meet with him that his appraisal was lower than it should have been. Next, he alleged that his "personal privacy was irreversibly violated and compromised" by Mr. Moeller's demand for confidential medical information which he contends was "a pretext for approving my sick leave request." Appellant also alleged that his supervisor wrongly changed his time and attendance record so that it reflected all sick leave instead of the time he had reported. He contended that the employing establishment failed to compensate him for performing above-grade work in 2004 and 2005. Lastly, appellant alleged that he was not selected for promotion to a higher grade due to retaliation for prior EEO activity, his race and disability.

In May 3, 2006, e-mails regarding appellant's higher-grade duties, Cindee Drogue, President of the union informed Ms. Snider that she was "not happy" with Ms. Snider informing her that appellant "did not qualify for over grade pay during 2004 or 2005." Ms. Drogue initially wrote requesting the status as it had been "agreed to work this out informally."

On October 27, 2006 Dr. Zielinski diagnosed anxiety, chronic depression, "disillusionment and job-related stress at the IRS, due to perceived racial discrimination and perceived unfair administrative actions against him." He opined that the incidents identified the March 11, 2006 letter "caused, aggravated and accelerated" appellant's current condition. In concluding, the Dr. Zielinski opined appellant's condition was guarded and thus it was doubtful whether he could continue working for the employing establishment.

On January 9, 2007 appellant submitted additional factual information including an April 22, 2005 promotion certificate compliance, copies of the Employee Personnel Resource Guide regarding time and attendance and the agreement between the employing establishment and the National Treasury Employees Union on employee rights and leave.

By decision dated January 23, 2007, the Office denied appellant's claim on the grounds that he failed to establish any compensable factors of employment.

On February 22, 2007 appellant filed a request for review of the written record by an Office hearing representative and submitted evidence and argument in support of his request.

In a March 19, 2006 supplemental brief appellant argued that he had established 12 compensable factors, that the Office erred in failing to consider he sustained a recurrence of disability and therefore the Office committed error in failing to accept his claim. He also argued that the Office misstated and failed to consider allegations specifically made by appellant. Lastly, appellant contended that the Office erred in failing to consider whether he sustained a recurrence of disability of his previously accepted claim.

By decision dated July 3, 2007, the Office hearing representative affirmed the denial of appellant's emotional condition claim.

LEGAL PRECEDENT

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 an illness has some connection with the employment but nevertheless does not come within the

concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.³

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 Federal Employees' Compensation Act.⁴ However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁵ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁶

For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, 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.⁷ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁸ The issue is whether the claimant has submitted sufficient evidence under the Federal Employees' Compensation Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁹ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.¹⁰

² 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁴ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁵ See *William H. Fortner*, 49 ECAB 324 (1998).

⁶ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁷ See *Michael Ewanichak*, 48 ECAB 364 (1997).

⁸ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁹ See *James E. Norris*, 52 ECAB 93 (2000).

¹⁰ *Beverly R. Jones*, 55 ECAB 411(2004).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹¹ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹²

ANALYSIS

With regard to appellant's contention on appeal, initially, the Board finds that the Office properly adjudicated his claim as a new claim instead of a recurrence claim. Appellant alleged 12 new factors occurring during his exposures subsequent to his employment injury of January 30, 1990, which he contended aggravated or caused his emotional condition. As he was alleging new factors based on new exposures, the Office proper adjudicated the case as new emotional condition claim rather than a recurrence of disability of a prior claim.¹³

Appellant alleged discrimination and retaliation in his federal employment. The Board finds that appellant's allegations of harassment do not constitute a compensable employment factor. Rather, they constitute his own perception of events and are insufficient to establish his claim for an employment-related emotional condition.¹⁴ In this regard, appellant has not established a factual basis for his perceptions of reprisal or discrimination by his supervisor following the filing of an EEO claim. He provided insufficient probative evidence to establish that harassment or reprisal occurred, as alleged.¹⁵ While appellant submitted memorandum from his supervisor requesting documentation for his sick leave and signing a health disclosure authorization form, the Board finds this evidence does not establish that his supervisor harassed or discriminated against him.¹⁶ There is no evidence to support that the supervisor's actions were unreasonable under the circumstances.

Regarding appellant's contention that he was denied a promotion due to discrimination, the Board has held that failure to be promoted is not compensable because the lack of a

¹¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹² *Id.*

¹³ See e.g., *Theresa L. Andrews*, 55 ECAB 719, 723 n.3 (2004), citing to Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997), "providing that in emotional stress cases a new claim should always be required if new incidents are alleged."

¹⁴ See *Barbara J. Latham*, 53 ECAB 316 (2002).

¹⁵ *James E. Norris*, *supra* note 9.

¹⁶ See *Charles D. Edwards*, *supra* note 8.

promotion does not involve the employee's ability to perform his or her regular or specially assigned duties but rather constitutes the employee's desire to work in a different position.¹⁷

Appellant also alleged that the employing establishment's failure to promote him was due to discrimination and retaliation and that he had filed an EEO complaint regarding this matter. The EEO action appeared to be based on the failure to be selected for a job appellant had applied for, but the record does not contain an EEO decision. Regarding his contention that he was denied a promotion due to discrimination, the Board find that there is no probative evidence of harassment, discrimination or retaliation. There are no EEO decisions, witness statements or other probative evidence to establish a compensable work factor in this regard.

Appellant further alleged that the employing establishment erred in requiring he sign a FOHA to process his sick leave, requiring medical documentation for his absence and denying his request for advanced sick leave. In addition, he alleged that on February 28, 2006 while on approved sick leave, he was notified by his supervisor that his leave on his time and attendance was changed from a combination direct and indirect time charge and sick leave to all sick leave. Appellant also expressed dissatisfaction with his current performance appraisal. Although the handling of evaluations and leave requests are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ As discussed, 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 employing establishment.¹⁹ Appellant has not established any evidence that the employing establishment committed error or abuse in his performance appraisal or matters involving leave requests and thus has not established a compensable employment factor.

Next appellant alleged that his supervisor acted inappropriately in some of his directions to him. These include instructing him to comply fully with an examiner conducting an examination of his tax returns; directing him to provide confidential medical documentation and information, directing him to report for duty on February 27, 2006 or be charged with AWOL unless he provided acceptable medical documentation; he was required to submit written requests for approval of any change in his sick leave status during the time he was off on approved sick leave and denial of his request for compensation for work performed in 2004 and 2005 at a higher grade. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Federal Employees' Compensation Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.²⁰ There is no evidence indicating that the employing establishment acted reasonably. Appellant has presented

¹⁷ *Andrew J. Sheppard*, 53 ECAB 170 (2001).

¹⁸ *Lori A. Facey*, 55 ECAB 217 (2004); *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁹ *Id.*

²⁰ *See Marguerite J. Toland*, 52 ECAB 294 (2001).

no corroborating evidence to support that the employing establishment erred or acted abusively with regard to this allegation and the employing establishment denied acting improperly. Thus, he has not established administrative error or abuse in the performance of these actions and therefore it is not compensable under the Federal Employees' Compensation Act.

For the foregoing reasons, appellant has not established any compensable factors under the Federal Employees' Compensation Act and therefore has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.²¹

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 3, 2007 is affirmed.

Issued: July 7, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See J.C.*, 58 ECAB ____ (Docket No. 07-530, issued July 9, 2007); *Margaret S. Krzycki*, 43 ECAB 496 (1992).