

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSCOE F. EVANS and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, Va.

*Docket No. 96-2528; Submitted on the Record;
Issued August 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty, as alleged; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for a hearing.

On September 20, 1994 appellant, then a 50-year-old letter carrier, filed a claim alleging that he sustained stress. Specifically, he alleged that after a heavy discussion on a workroom floor on April 9, 1993, he felt as if something "popped on the side of [his] brain" and after that he could not think under pressure. Appellant stated that a threat on December 14, 1993 aggravated it.

By letter dated April 13, 1993 and March 27, 1994, appellant alleged certain incidents at work constituted harassment by his supervisors. He stated that on December 28, 1991, his supervisor, Melvin Kenny, stated that he was going to run him off his route because of the high mail volume. He stated that on June 19, 1992 Mr. Kenny and Mr. Archer did a street observation on him, and told him that he did not have both hands on the steering wheel and was not driving fast enough. On March 9 or April 9, 1993 or both, Mr. Kenny told him he was not casing fast enough. Appellant also stated that on March 12, 1993 Mr. Kenny threatened to give him a letter if he was not back by 4:00 p.m. and when appellant returned at 4:20 p.m., Mr. Kenny said that appellant was late, but appellant stated that he had been authorized 30 minutes overtime based on a Form 3996. In a similar incident, appellant alleged that on May 11, 1993 his supervisor, Allan D. Page, and his acting supervisor, Steve Rawl, gave him a letter of warning because he came back from his route at 5:30 p.m. on May 10, 1993 when he was told to make it back by 5 p.m. On August 16, 1993 when he brought a CA-17 (an attending physician's report) to Mr. Page, Mr. Page told him that his physician did not complete the form properly and "according to the report, all they needed to do was put [him] in a casket because [he] could not do anything." Appellant stated that Mr. Page asked him where he was going and appellant said he was going home to lie down, and Mr. Page said that he was going to call him at home.

Appellant stated he did not receive the call but he felt that it was harassment. On December 14, 1993, Mr. Kenny told appellant that he would run appellant over if he got in his way.

By letter dated September 20, 1994, the employing establishment controverted the claim.

In a report dated August 17, 1994, Dr. Hamdy I. Sayed, a specialist in occupational medicine, stated that appellant displayed a number of stress symptoms including difficulty breathing. He stated that appellant had presented him with three Equal Employment Opportunity (EEO) settlement counselling process papers.

By letter dated April 4, 1995, the Office requested additional information from the employing establishment and appellant.

By letter dated March 1, 1995, Ms. Teresa D. Pope, a clinical social worker, stated that appellant was receiving psychotherapy for the diagnosis of adjustment disorder with mixed anxiety and depressed mood secondary to interpersonal difficulties at work.

Appellant submitted hospital progress notes dated from September 28, 1994 through February 6, 1995. A note dated December 7, 1994 stated that appellant had a headache, possible blurring of vision and some heaviness or numbness in the hand as well as weakness in his legs and slightly shaky. The note stated that all this happened immediately after a superior of his made charges related to work. A note dated September 28, 1994 stated that appellant returned with some increase in his stuttering as well as inability to tolerate as much stress as in the past. The note stated that he had submitted some incident reports to his supervisors at work.

By letters dated January 24 and May 16, 1995, the Office requested additional information from appellant.

In a report dated May 1, 1995, Dr. Graenum R. Schiff, a Board-certified psychiatrist and neurologist, diagnosed adjustment disorder with mixed anxiety and depressed mood secondary to interpersonal difficulties at work and stated that appellant had presented five EEO settlements from April 9, 1993 through January 13, 1995 because of problems with a supervisor at work. He stated that there were work stressors because of the conflict with his supervisor and he opined that appellant might have a preexisting personality disorder which predisposed him to work conflicts.

By letter dated June 6, 1995, Mr. Page stated that appellant was required to perform his job assignment and he was not under any more stress or pressure than any other employee to perform his job. He stated that appellant might have had "run-ins" with management in the past but that he was always treated with dignity and respect in his dealings with management.

By decision dated September 7, 1995, the Office denied the claim.

In an undated letter received by the Office on September 25, 1995, appellant requested an oral hearing before an Office hearing representative. Appellant submitted some hospital progress notes dated from December 6, 1994 through June 29, 1995 documenting that he was still being treated for anxiety and stress as well as right shoulder pain, headache and angina.

By notice dated May 1, 1996, the Office advised appellant of the time and place of a hearing scheduled for June 5, 1996. The Office indicated that the hearing would be held in Norfolk, Virginia.

By letter dated May 16, 1996, which was received by the Office on May 23, 1996, appellant stated that he still desired a hearing but would like the hearing in Richmond, Virginia which is closer to his home. He stated that he lived 120 miles from Norfolk, Virginia.

By letter dated May 29, 1996, the Office hearing representative advised appellant that the Office did not hold hearings in Richmond and the nearest location where it did hold hearings was Norfolk, Virginia. The Office stated that appellant could withdraw his request for a hearing if he did not want to travel to Norfolk in which case he would still retain his right to request reconsideration of the Office's decision or request review by the Board. Further, the Office hearing representative stated that unless it heard otherwise from appellant, he assumed that appellant would attend the hearing scheduled for June 5, 1996 in Norfolk.

A handwritten note dated June 3, 1996 stated that appellant called and left a message on voice mail stating that he would not appear for the hearing in Norfolk as it was too far to travel but he would submit a written letter.

By letter dated June 3, 1996 which was received by the Office on June 6, 1996, appellant stated that the hearing scheduled for June 5, 1996 was too far for him to travel and enclosed a statement dated February 8, 1996 stating that he believed his problems at the employing establishment began on November 23, 1991 when the Hampstead Settlement was put into effect and he received a new mailing route.

By letter decision dated June 17, 1996, the Office determined that appellant had abandoned his request for a hearing in that he did not request cancellation at least 3-calendar days prior to the hearing schedule for June 5, 1996 or show good cause within 10-calendar days of the scheduled hearing for his failure to appear. By decision dated August 28, 1996, the Office denied reconsideration of the June 17, 1996 decision.

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

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 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.¹ On the other hand, the disability is not covered where it results from such factors as an

¹ 5 U.S.C. §§ 8101-8193.

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.²

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.³ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.⁴

In the present case, appellant did not present evidence to corroborate he was threatened by Mr. Kenny in December 1991 "to be run off his route" or that when he presented Mr. Page with a CA-17, he was told he belonged in a casket or that he would call him if he went home. Appellant has not substantiated that these allegations constitute factors of employment.⁵

Appellant's allegation that Mr. Kenny told him on December 14, 1993 that he would run over him if he were in his way was corroborated by two witnesses, Anthony L. Coles and Michael S. Whitener, and was reflected in an EEO settlement dated January 21, 1994. Although Mr. Kenny's statement pertained to appellant's alleged slow driving, and as such pertains to the monitoring of appellant's work and constitutes an administrative function of the employing establishment,⁶ the Board finds it constitutes harassment and was abuse in the administrative matter. It therefore constitutes a factor of employment.

Appellant has established that management performed mail counts on him on the second day he began his new route in December 1991, on May 2, 1993, and possibly on July 8 through 10, 1993, and that on June 19, 1993, management told appellant he was not casing fast enough, as corroborated by the EEO grievance dated April 29, 1993 and an EEO settlement dated June 8, 1993. The April 29, 1993 grievance also corroborates that on March 12, 1993, appellant was threatened with a letter of warning if he did not return by 4 p.m. although he had a conference on March 13, 1993 with Mr. Kenny to ascertain why he was threatened with a letter of warning since had authorized overtime. In an EEO settlement dated December 20, 1993, appellant withdrew his complaint stating that the letter of warning issued to him on May 11, 1993 had been withdrawn. PS Forms 4584 of Driving Observation Practices indicated that appellant's driving had been observed on January 6 and February 6, 1992 and his driving was fine. To the extent appellant's route was subject to mail counts and driving performance evaluations and management told appellant that his casing was not fast enough, the monitoring of his work by his supervisor is an administrative function of the employer and as such is not

² *Clara T. Norga*, 46 ECAB 473, 480 (1995); see *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

³ *Clara T. Norga*, *supra* note 2 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁵ See *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

⁶ See *Clara T. Norga*, *supra* note 2 at 480.

compensable.⁷ Further, disciplinary actions such as management's issuing appellant a letter of warning relate to the administrative function of the employer. Appellant has not submitted evidence sufficient to establish that management acted abusively in the administrative matters alleged.⁸

Appellant's burden of proof is not discharged by the fact that he has identified an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the identified compensable employment factor, in this case, Mr. Kenny's telling appellant he would run him over.⁹

None of the medical evidence of record, however, addresses any specific factors of employment or relates them as the cause of appellant's emotional condition. In his August 17, 1994 report, Dr. Sayed merely stated that appellant displayed a number of stress symptoms and that appellant presented him with three EEO settlements. Dr. Sayed did not cite specific factors which contributed to appellant's emotional condition. His opinion therefore lacks sufficient probative value to meet appellant's burden of proof.¹⁰ The March 1, 1995 letter of Ms. Pope, a clinical social worker, which diagnosed mixed anxiety and depressed mood secondary to interpersonal difficulties at work is not probative because she is not a physician within the meaning of the Act.¹¹ Dr. Schiff's May 1, 1995 report in which he diagnosed adjustment disorder with mixed anxiety and depressed mood secondary to interpersonal difficulties at work is also insufficient to establish the requisite causal connection. He stated that appellant presented five EEO settlements from April 9, 1993 through January 13, 1995 because of problems appellant had with a supervisor at work and that there were work stressors because of the conflict with his supervisor. Dr. Schiff did not address any specific incidents contributing to appellant's emotional problem. Therefore, his opinion is not sufficient to meet appellant's burden of proof.¹² The hospital progress notes dated from September 28, 1994 through February 6, 1995 also do not establish the requisite causation, they only note appellant had symptoms of headache, possible blurring of vision and some heaviness or numbness in the hand as well as weakness in his legs related to charges at work and an increase in his stuttering due to incidents with his supervisors at work. These notes do not address specific incidents at work which caused or contributed to appellant's emotional condition. Despite the Office providing appellant with several opportunities, appellant has presented insufficient medical evidence to establish that he sustained an emotional condition causally related to his employment.

⁷ See *Daryl R. Davis*, 45 ECAB 907, 911 (1994); *Jimmy Gilbreath*, 44 ECAB 555 (1993).

⁸ See *Barbara J. Nicholson*, 45 ECAB 803, 809 (1994).

⁹ *Clara T. Norga*, *supra* note 2 at 482-83; see *William P. George*, 43 ECAB 1159 (1992).

¹⁰ See *James W. Griffin*, 45 ECAB 774, 779 (1994).

¹¹ See *Arnold A. Alley*, 44 ECAB 912, 921 (1993).

¹² *James W. Griffin*, *supra* note 10 at 779.

Section 8124(b) of the Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.¹³ Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in relevant part:

“A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in the assessment of costs against such claimant.”

* * *

“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.”¹⁴

In the present case, in an undated letter received by the Office on September 25, 1995, appellant requested a hearing before an Office hearing representative in connection with the Office’s September 7, 1995 decision. By notice dated May 1, 1996, the Office advised appellant of the time and place of the hearing scheduled for June 5, 1996 in Norfolk, Virginia. By letter dated May 16, 1996, which was received by the Office on May 23, 1996, appellant requested that the site of the hearing be changed to Richmond as Norfolk was too far from his home. By letter dated May 29, 1996, the Office hearing representative advised appellant that hearings were not held in Richmond and, unless he heard otherwise from appellant, he would assume that appellant would attend the hearing scheduled for June 5, 1996 in Norfolk. A handwritten note dated June 3, 1996 stated that appellant called and informed that Office that he would not appear for the hearing in Norfolk as it was too far to travel. By letter dated June 3, 1996, which was received by the Office on June 6, 1996, appellant stated that the hearing scheduled for June 5, 1996 in Norfolk was too far for him to travel. Since appellant did not request postponement at least three days prior to the scheduled date of the hearing nor request within 10 days after the hearing that another hearing be scheduled, his failure to appear at the scheduled hearing constitutes abandonment of his request for a hearing.¹⁵ Appellant’s reason for not attending the hearing, that it was too far from where he lived, does not constitute “good cause” within the meaning of the Act.¹⁶

¹³ 5 U.S.C. § 8124(b).

¹⁴ 20 C.F.R. §§ 10.137(a), (c).

¹⁵ See *Clara T. Norga*, *supra* note 3 at 487.

¹⁶ See *Eric E. Brickers*, 45 ECAB 686, 689 (1994); *Stephen A. Novak*, 42 ECAB 615, 618 (1991).

The decisions of the Office of Workers' Compensation Programs dated August 28 and June 17, 1996 and September 7, 1995 are hereby affirmed.

Dated, Washington, D.C.
August 14, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member