

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. ZURCHER and U.S. POSTAL SERVICE,
POST OFFICE, Colorado Springs, Colo.

*Docket No. 97-144; Submitted on the Record;
Issued December 15, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

This is appellant's sixth appeal before the Board.¹ None of the other appeals were on this same issue.

On September 23, 1994 appellant, then a 36-year-old distribution clerk, filed a claim alleging that postal management failed to provide him with a nonhostile working environment because they allowed Beva Roussel, a coworker, to harass and intimidate him for a year. Appellant specifically alleged that Ms. Roussel coughed at him, whistled at him, snapped her fingers at him, laughed at him, stared at him, made faces at him, and bad-mouthed him, which caused stress and caused his other employment-related conditions to worsen.

Appellant's supervisor denied that appellant ever brought these alleged behaviors to his attention, or that he ever observed them himself. Another supervisor noted in an October 24, 1994 statement that she had no knowledge of appellant being harassed by Ms. Roussel, that other clerks expressed hard feelings about appellant "getting away" with his continuation-of-pay claims but none could substantiate his claims of harassment by Ms. Roussel, that appellant's file was full of claims of harassment both by management and by other employees, and was full of claims for injuries each time he returned from a continuation-of-pay injury, that appellant gave the appearance of an employee who had no desire to work, that his accusations concerning harassment were unjustified, and that when appellant was asked to perform an unpleasant task he became disagreeable and filed a continuation-of-pay claim. In another October 24, 1994 statement, the station manager noted that after close observation he observed no harassment of

¹ Docket No. 94-1397 (issued July 14, 1995); Docket No. 94-2221 (issued January 6, 1997); Docket No. 95-1905 (issued May 6, 1997); Docket No. 96-270 (issued December 8, 1995); Docket No. 96-2417 (pending).

appellant by Ms. Roussel. He did note, however, that Ms. Roussel laughed spontaneously, generally in conversations with others, which was allowed as long as it was not disruptive.

In support of his claim appellant submitted a January 21, 1994 report from Dr. Jack L. Rook, a Board-certified physical medicine and rehabilitation specialist, which stated that appellant's myofascial pain complaints were made worse by stress at work. He opined that appellant appeared to have some sort of post-traumatic stress disorder from chronic stress at work and needed a stress-free environment.

Appellant also submitted an August 12, 1991 pain program discharge report. The report included a section from a psychologist, Dr. Kenneth D. Allred, stating that appellant's pain made him irritable. Multiple Forms CA-17 dated during 1993 were additionally submitted from Dr. Allred, but none of them addressed specific employment factors, citing only general allegations of "job stress" and "management harassment, discrimination, constant humiliation" as the cause of his diagnosed "adjustment disorder with mixed emotional features." A July 6, 1993 report from Dr. Allred stated that he believed appellant's psychological and emotional problems resulted from his work injury. A March 17, 1994 report from Dr. Allred stated that appellant had "repeated difficulties" with work and experienced "considerable stress."

Appellant submitted a coworker's statement which indicated that about three months earlier the coworker watched Ms. Roussel follow appellant as he left the building and observe appellant get into his vehicle.

By decision dated May 15, 1995, the Office of Workers' Compensation Programs found that appellant had substantiated that only one employment incident occurred, that Ms. Roussel stood on the dock when he left work and stared at appellant until he drove away, but that this was not found to constitute harassment. The Office found that appellant did not establish that he sustained an injury in the performance of duty.

Appellant requested a hearing on the denial of his claim, which was held on October 23, 1995. In support of his testimony he submitted several witness statements. A June 1, 1995 statement from Michael Schott noted that since appellant had been assigned to that section, Ms. Roussel had expressed dissatisfaction with the fact that he worked there; that Ms. Roussel had practiced "subversive harassment" by coughing, snapping her fingers and staring at appellant; that in the previous two weeks another employee made comments to others regarding appellant's Equal Employment Opportunity claim; and that Ms. Roussel had also harassed Mr. Schott. An August 18, 1995 statement from Mr. Schott stated that on that date at 0640 hours he witnessed Ms. Roussel walk past appellant, making a coughing-gagging noise and laughing to herself. He opined that Ms. Roussel's trip was 180 degrees out of her way and was taken just to harass appellant.

After the hearing appellant submitted more witness statements. George Calvi alleged that on October 4, 1995 at 0530 Ms. Roussel came into the area clapping and whistling to harass himself and appellant. Pamela Rowland provided an October 23, 1995 statement noting that from the time appellant bid on his job, Ms. Roussel harassed him daily. She stated Ms. Roussel whistled off-key all day and popped and snapped her fingers constantly. Ms. Rowland alleged that when appellant entered the work area Ms. Roussel would leave and not return for hours. A

December 8, 1995 statement from Michael Furphy stated that he had witnessed Ms. Roussel harassing everyone at work; coughing when appellant walked near, making faces at appellant, marking happy faces on the calendar for every day appellant missed work, making finger gestures at appellant, and speaking about appellant in a derogatory manner. However, no specific incidents were identified.

Appellant also later alleged that management was harassing him by not giving him the position he sought. He additionally submitted Forms CA-17 dated 1995 from his treating Board-certified orthopedic surgeon, Dr. William Ciccone and Dr. Rook, which did not address appellant's emotional condition.

By decision dated May 3, 1996, the hearing representative affirmed the prior Office decision finding that appellant failed to establish any compensable factors of employment. The hearing representative noted that appellant failed to provide sufficient evidence to establish harassment by Ms. Roussel, noting the witness statements were not specific as to frequency or duration of the alleged behavior.

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

To establish appellant's claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.³

Workers' compensation law is not applicable 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 concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or to a requirement imposed by

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ See *Martha L. Watson*, 46 ECAB 407 (1995); *Donna Faye Cardwell supra* note 2.

the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not compensable where it results from such factors as an employee's fear of a reduction-in-force, his frustration from not being permitted to work in a particular environment or to hold a particular position, or his failure to secure a promotion. 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.⁴ 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.⁵ 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. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.⁶

When working conditions are alleged as factors in causing 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.⁷ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁸ When the matter asserted is a compensable factor of employment, and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.⁹

In the instant case, appellant has alleged harassment by Ms. Roussel and has provided a number of statements from coworkers. The Board finds that the statements provided to the record are very general in nature as to the behavior alleged on the part of Ms. Roussel and lack adequate specificity as to the time, place and manner of alleged harassing activity. For this reason, the Board finds that appellant has not substantiated his allegations of harassment.

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984).

⁶ *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991).

⁷ *See Barbara Bush*, 38 ECAB 710 (1987).

⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

Moreover, none of the medical evidence attributes the development of appellant's emotional condition to the instances of alleged harassment by Ms. Roussel, but instead attributes it to appellant's previous employment injuries, to "job stress," to unsubstantiated management harassment, to undocumented discrimination and humiliation, to post-traumatic stress disorder, and to unspecified "repeated difficulties." For this reason, the medical evidence is also insufficient to establish that appellant sustained an emotional condition while in the performance of duty, causally related to compensable factors of his federal employment.

Accordingly, the May 3, 1996 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Dated, Washington, D.C.
December 15, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member