U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY L. SAVAGE and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

Docket No. 01-1149; Submitted on the Record;
Issued February 6, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied his request for an oral hearing.

On April 2, 2000 appellant, a 49-year-old clerk, filed an occupational disease claim alleging that factors of his employment caused mental stress and anguish along with an exacerbation of his preexisting post-traumatic stress disorder. The record reflects that appellant is a Vietnam veteran who has the condition of post-traumatic stress disorder and has a severe right knee injury as a result of a nonwork accident, in which only a 79-degree bend at the knee is obtainable. Appellant worked numerous years as a multi-position letter sorting machine (MPLSM) operator until the employing establishment abolished the position effective December 11, 1996. The employing establishment advised in an October 25, 1996 letter that all MPLSM operators would become unencumbered distribution clerks and that failure to bid or receive a bid would result in remaining an unassigned distribution clerk, subject to assignment at any level 6 vacancy. Appellant was not successful in bidding for positions he wanted and he continued to work at assigned duties. In March 1998 the employing establishment directed appellant to participate in training for the position of flat sorter operator. Appellant was unsuccessful at completing the training, but was assigned to take the training on a continuous basis for nine months. Appellant worked in the manual secondary letters operation until April 1999 and was then assigned to the manual primary operation when the previous operation was phased out.

In a statement dated May 28, 2000, appellant advised that his post-traumatic stress disorder was secondary to the problems he encountered working for the employing establishment. Appellant alleged that he had been subjected to abuse and harassment beginning in December 1996 until March 9, 2000. In December 1996 the job he was hired for was phased out and the people were told to bid on other jobs. Appellant bid on all level 6 jobs but was transferred to work on the loading dock. Appellant stated that the job lasted about one year and

then he was told he would have to train for the flat sorter position. Appellant asserted that it was at this point he felt his rights were being violated.

Appellant stated that he has very limited use of his right leg and could only bend it 79 degrees. He stated that the flat sorter operation position was a safety hazard both to himself and to other people in the area. Appellant advised that his post-traumatic stress disorder was affected by noise and would be affected by the type of operation the machine performs as well as other high speed automated machinery.

Appellant stated that, on March 9, 1998, he was told to report for flat sorter training. Appellant stated that he filed a grievance as management was trying to force him to take the position and he was medically unable to perform the position. Appellant related that there has been no response to his grievance to date.

Appellant stated that the machine training took 30 hours to complete, but since he could not pass the first part of the test, he was made to take the training approximately five times for almost nine straight months. He related a telephone conversation with the union president, union vice-president and the clerk craft director, in which he was advised that he had to take the flat sorter job even when the earlier conversation had noted that the contract did not apply to him. He stated that he became very suspicious and felt helpless when the national union in Washington never returned his calls. He also related that he felt harassed in having to get medical documentation as he was trying to keep his medical condition quiet. He stated that he had turned his medical information into Bob Neff, a supervisor, but the letter never showed up in his file. A copy of a November 29, 1999 note from Dr. Risa Spieldoch, a physician, advised that a flat sorter job was not appropriate for appellant. Dr. Spieldoch advised that the stool was a problem, but most importantly, she would like appellant to avoid loud machinery as it could promote flashbacks since appellant has been diagnosed with post-traumatic stress disorder.

Appellant advised that additional medical reports from Dr. Spieldoch and Dr. Kneisly showed that management was well aware of his physical problem. Appellant asserted that he was being threatened by supervisors Lew Lefwich and Linda Peters that he was going to work on the flat sorter. Appellant stated that he had bid on jobs which he could perform, but had been unsuccessful due to his lack of seniority.

Appellant stated that he had been working approximately two years on manual secondary letters, when he was advised in April 1999, that the operation would be coming to a close. Appellant stated that management told him that he was going to have to work as a flat sorter. Appellant related that he worked the manual primary letter operation for approximately a year and, although the harassment continued the job was tolerable. He advised that, although he was on the overtime desired list, he was not given any overtime. Appellant stated that this was a form of harassment to decrease his income. Appellant stated that the union was not helping him in his situation as he had become a problem and it just wanted him out of their hair.

Appellant asserted that, in December 1999, he was working in manual primary and was asked by a female employee if he would rub her neck. Appellant noted that it was commonplace in this work operation for people to rub one anothers neck or shoulders. Appellant stated that he thought nothing of rubbing his coworkers neck. Appellant stated that supervisor Pat Halloway

called him out into the aisleway and advised him that it could be considered sexual harassment. Appellant stated that, although almost everyone in the work areas did it, he did not argue the point as he was not going to give management any reason to harass him.

Appellant alleged that Beverly Anderson, supervisor of manual primary, had been watching him take breaks, but was not paying attention to other people who might be gone on a break for over an hour at a time or longer. He stated that Ms. Anderson had harassed him on two separate occasions in December about taking long breaks. Appellant stated that he had taken a 15-minute break and was in the bathroom. Ms. Anderson told him to use the bathroom by his work area in manual primary. Appellant stated that he took his breaks on the second floor in the break room and did not want to walk all the way downstairs to use the bathroom on a first floor. Appellant stated that Ms. Anderson had advised him that management was watching him, which he felt was a threatening statement and there was a threatening tone to her voice.

On December 23, 1999 appellant was in the break room sitting with Nicole Walsh. Appellant used the restroom after his break and went back downstairs to his work area, where Ms. Anderson advised that he and Ms. Walsh were wanted in the MDO office. In the MDO's office, both of them were asked where they had been. Appellant stated that he told Ms. Peters that he was on break and Ms. Walsh stated that she was on lunch. He stated that his time was adjusted to show he took a 50-minute lunch break. Appellant related that he was not sure whether this incident of harassment was directed against him or whether he was caught up in an altercation between management and Ms. Walsh. Appellant stated that, after the interview was conducted, the union steward advised him that he had nothing to worry about. Appellant stated that, although this was reassuring, he still felt the whole incident was a total lie. Appellant submitted a copy of Ms. Walsh's statement of the event. Appellant also submitted a copy of a January 4, 2000 notice of suspension for improper conduct/unauthorized absence from assigned work area for the incident of December 23, 1999. Appellant related that, when supervisor Ms. Anderson handed him the letter, he told her that the charge was so bogus and unbelievable and that he had been told by the union steward that it would be thrown out in step 1 of the grievance procedure.

In early January 2000, appellant returned to work and found that his locker had been locked. Appellant related that he never locked his locker and kept the key to his locker on the top shelf of his locker. Appellant stated that as a master key to open the lock could not be located, a mechanic had to chisel the lock off. Once the lock was cut off and the locker opened, appellant related that his key was still on the top shelf. Appellant stated that his radio had been moved, but nothing was missing. Appellant felt he was being set up to get fired.

On January 4, 2000 appellant was charged with third party sexual harassment. He related that Ms. Peters, Velma Lennon and Lynette Downing, a union steward, were present when he was charged and informed of the employing establishment's policy of zero tolerance for sexual harassment. Appellant stated that he did not speak the whole time because he was too afraid to open his mouth. When he returned to his duty station, appellant stated that the union steward advised him that he had better be careful because management was watching him and had advised him harassment charges could be filed. Appellant asserted that he had a witness to this conversation, but provided no such evidence. On February 6, 2000 the union steward informed

him that the grievance was going to a step two as management was pursuing the charge. Appellant stated that he's heard of step two grievances taking years to get settled and that this caused stress.

Appellant stated that he was off work for several weeks on sick leave and when he returned, he found out that he was the only person still left from the MPLSM abolishment. He stated that there was a conspiracy to get him to bid on a job. Appellant alleged that Mr. Lefwich, a flat sorter supervisor and Ms. Peters, MDO requested medical documentation as to why he could not work as a flat sorter. Appellant stated that he was handed the same form that Dr. Spieloch had already filled out and which he had turned in. Appellant alleged that he was being harassed. He stated that he became angry as he did not want people to know about his post-traumatic stress disorder.

Appellant addressed his frustration the union regarding its settlement of the December 23, 1999 incident. A copy of the March 3, 2000 settlement of the seven-day suspension dated January 4, 2000, was submitted.

Appellant also submitted treatment notes from 1978 through 1981 and along with a July 9, 1991 report, which appellant stated was from Dr. N.E. Deboo, a physician, concerning the progress and condition his right knee and leg, which resulted from a .357 magnum gunshot wound. The July 9, 1991 report states that appellant has chronic swelling of the right leg and a largeness to the right leg, which the physician opined was secondary to poor venous flow.

An August 28, 2000 report from Dr. Kent A. Eichenauer, a clinical psychologist, advised that appellant has been diagnosed with post-traumatic stress disorder from his assignment in Vietnam, which had a definite impact on his perspective on life. He said appellant became suspicious of other people's motives and felt justified in evening the score regardless of the means. Dr. Eichenauer stated that appellant felt persecuted by the employing establishment, which resulted in the current workers' compensation claim. He advised that appellant believed there were undo delays in the workers' compensation claim which was related to persecution at the employing establishment.

By letter dated July 18, 2000, the employing establishment contested appellant's claim. Ms. Peters, MDO for tour 1, recalled an unusual situation where a Dr. Patrick Turnock called around March 9, 2000, inquiring about postal work in general such as call-in procedure and light-duty procedure and asked her observations of appellant's actions, but did not disclose any information as to the nature of appellant's medical condition. The employing establishment also noted that although appellant had not received any discipline in almost 10 years, several disciplinary actions were received in 1990 and 1991. Ms. Peters also stated that appellant was verbally warned prior to his receipt of the disciplinary action regarding the length of breaks that he was taking was beyond what was authorized.

By decision dated September 29, 2000, the Office found that fact of injury was not established, as the evidence of record did not establish that he sustained an emotional condition in the performance of duty.

By letter postmarked October 31, 2000, appellant requested an oral hearing.

In a decision dated December 18, 2000, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked October 31, 2000, which was more than 30 days after the issuance of the Office's September 29, 2000 decision and that he was, therefore, not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.[1] There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[2]

The first issue to be addressed is whether appellant has established compensable factors of employment that contributed to his alleged emotional condition or disability. 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 Federal Employees' Compensation Act.[3] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or 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 a personal injury sustained while in the performance of duty within the meaning of the Act.[4]

[1] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

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

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

[4] *Id.*

With regard to his allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. It is well established that mere perceptions of harassment or discrimination do not constitute a compensable factor of employment. A claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.[5] The Board has noted that, 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 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.[6] The Office has the obligation to make specific findings with regard to the allegations raised by a claimant. 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 compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings, alone, are not compensable. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence.[7]

The Board finds that the administrative and personnel actions taken by management in this case contained no evidence of agency error and are, therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless it is established that the employing establishment acted unreasonably.[8]

Appellant has presented insufficient evidence that the employing establishment acted unreasonably or committed error with regard to the alleged incidents involving personnel matters on the part of the employing establishment. The Board notes that the abolition of the MPLSM position and the requirement that appellant be assigned other work activities if a bid was unsuccessful, is an administrative action of the employer. No error or abuse has been shown in this case. As to appellant's allegation that management unduly pressured him regarding the training for the flat sorter position and the repeated requests that medical documentation be provided to show why appellant cannot perform the flat sorter position, the record is devoid of any evidence that the employing establishment acted in an abusive or unreasonable manner. As appellant stated that he did not want management to know of his diagnosed medical condition, it was reasonable for management to train appellant for the position until the training was successfully completed. With regard to appellant's allegation that he was harassed by management when placed in a flat sorter position, appellant did not provide any evidence that would demonstrate that the employing establishment erred in making work assignments to

[5] *Curtis Hall,* 45 ECAB 316 (1994); *Margaret S. Krzycki,* 43 ECAB 496 (1992).

[6] *Norma L. Blank,* 43 ECAB 384 (1992).

[7] *Id.*

[8] *Alfred Arts,* 45 ECAB 530 (1994).

appellant. Although appellant was later advised in February 2000, that additional medical evidence was needed to document his inability to perform the flat sorter operator position, no error or abuse has been documented by this administrative action of the employer.

The discussions appellant had with his supervisors concerning sexual harassment, extended breaks, which restroom he could use and statements that management was watching him, are administrative actions of the employer. In this case, there is no evidence of record to substantiate that the employing establishment acted unreasonably in an administrative or personnel matter.[9] No error or abuse has been documented with respect to the December 23, 1999 meeting with a manager and the subsequent interview with an union steward present whereby appellant had alleged he was on break and the management contended that he was at lunch. The January 4, 2000 notice of suspension pertain to actions taken in an administrative capacity and, therefore, is not a compensable factor of employment.[10] Additionally, the management's action of taking the charge of third party sexual harassment from a step one to a step two grievance level and the eventual settlement is an administrative function. No evidence of error or abuse has been documented. Appellant's frustration with and disagreement with the union's action in reaching a settlement are outside the scope of his employment and, therefore, is not compensable.

Appellant contented that as he was the only remaining displaced MPLSM operator in February 2000 and that this was part of a conspiracy to get him to bid on a job. Appellant had advised in his statement that he had bid on many positions, but was unsuccessful. As the record is devoid of any evidence to indicate that appellant was unsuccessful in his bids due to any conspiracy, there is no evidence to support appellant's contention that he was the only remaining displaced MPLSM due to management error or abuse.

Although appellant has attributed his locker being locked in early January to management harassment, there is no evidence to indicate how or why appellant's locker ended up being locked. Nothing was stolen from appellant's locker and appellant's key was still on the top shelf of his locker. This is not a compensable employment factor.

Accordingly, a reaction to such factors did not constitute an injury arising within performance of duty. The Office properly concluded that in the absence of agency error such personnel matters were not compensable factors of employment.

The Board finds that the Office properly denied appellant's request for an oral hearing on his claim before an Office hearing representative.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office's final decision.[11] A claimant is not entitled to a hearing if the request is not made within 30 days of the

[9] *Margreate Lublin*, 44 ECAB 945 (1993).

[10] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

[11] 5 U.S.C. § 8124(b)(1).

date of issuance of the decision as determined by the postmark of the request.[12] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[13] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[14]

In this case, because appellant's request for a hearing was postmarked on October 31, 2000, more than 30 days after the Office's September 29, 2000 decision, he is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.[15]

The December 18 and September 29, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 6, 2002

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] 20 C.F.R. § 10.131(a)(b).

[13] *William E. Seare*, 47 ECAB 663 (1996).

[14] *Id.*

[15] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).