

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID F. DUESTERBECK and U.S. POSTAL SERVICE,
POST OFFICE, Billings, MT

*Docket No. 03-1770; Submitted on the Record;
Issued November 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On December 21, 2000 appellant, then a 53-year-old station manager, filed an occupational disease claim alleging that he sustained stress, headaches and an upset stomach due to agency retaliation, persecution and punishment. Appellant stopped work at the Butte, Montana branch of the employing establishment on October 8, 1999 and returned to work on July 17, 2001 at the Lincoln, Montana branch of the employing establishment. He returned to work at his original location as a station manager on November 7, 2001 where he continues to work.

In an accompanying narrative statement dated December 23, 2000, appellant alleged that his supervisor, the manager of postal operations, Sandra Cook, harassed him, retaliated against him and discriminated against him and threatened his job. He indicated that he had two Equal Employment Opportunity (EEO) Commission complaints against her, and that the events of December 15, 2000 "triggered mental duress, emotional trauma, aggravation, mental and emotional abuse, badgering, and assault to [his] well-being."¹ Appellant provided a lengthy list of his physical symptoms and argued that he was not provided with an appropriate work accomplishment rating form, such that he was denied a pay increase.

By letter dated January 19, 2001, the Office of Workers' Compensation Programs requested that appellant submit a detailed narrative of the factors he implicated in causing his emotional condition and medical evidence supporting causal relation.

In support of his claim, appellant submitted several statements that predated his work stoppage by several months. In February 1999 he believed that he was discriminated against by

¹ This involved receiving a certified evaluation letter with a blank space for his current assignment.

Ms. Cook. Appellant also provided an undated statement from Robert Bengtson who denied that he touched or hit appellant. In an August 23, 2000 statement, appellant claimed that Ms. Cook had threatened another supervisor too.

In further response, appellant submitted a January 24, 2001 statement in which he accused Ms. Cook of introducing herself to him by saying that he was in the KMA (Kiss My A--) club and that she had fired a guy like him in Walla Walla, Washington. Appellant claimed that this made him fear for his job. Appellant claimed that Ms. Cook forced him to work very long hours and denied him straight pay for the extra hours worked. Appellant also claimed that he was battered by the acting maintenance supervisor in front of Ms. Cook but that she took no further action, and that made him very upset and fearful about this act of violence, as he felt unsupported by Ms. Cook. Appellant claimed that thereafter he became very forgetful due to mental stress, and that he was told by a coworker that Ms. Cook wanted his head on a "silver platter," which caused him further physiological symptoms including severe chest pains, severe stomach cramps, headaches, shakiness, sleep deprivation and diarrhea. Appellant claimed that Ms. Cook took away his ability to delegate assignments to his subordinates and that a new supervisor was assigned to "get" appellant. When appellant went out on sick leave the locks to his office were changed which caused him stress. He stated that he had complied with reporting requirements but was charged with being AWOL (absent without leave) instead of sick leave. Appellant claimed that he was demoted twice which caused panic attacks and severe anxiety and that it was being done intentionally to "drive [him] crazy."

By letter dated February 21, 2001, Ms. Cook responded to appellant's allegations denying them all, and noting that she never fired someone in Walla Walla, that she did not dislike appellant, that she never required him to work beyond his regular hours, that Postal Regulations did not provide for additional pay for Special Exempt employees, that she did not insult appellant, that the battery alleged was merely an elbow gesture made without contact during a meeting on violence in the workplace, and that appellant did not report it as an assault. Ms. Cook noted that there was no act of violence against appellant, that appellant did not seek medical treatment for his condition for three months after he stopped working, that she never told anyone she wanted appellant's head on a silver platter or that she was "out to get" appellant, that appellant never reported his fear of violence or threats, that appellant had been delegating too much to his subordinates, and that she never harassed appellant. Ms. Cook denied that she ordered a carrier to deviate on his route to deliver a letter to appellant, that she never ordered appellant to see a physician, that the letter on October 23, 1999 about an investigative interview was written prior to appellant calling in sick, and that appellant was not so sick that he could not participate in his defense.

In a Form CA-20 dated March 19, 2001, Dr. Nathan Munn, appellant's attending physician, a Board-certified psychiatrist, diagnosed panic disorder and post-traumatic stress disorder. The report indicated that appellant was totally disabled from October 25, 1999 onward. Further subsequent medical reports were provided which discussed appellant's varied psychological and psychiatric conditions.

In a March 7, 2001 extensive narrative, appellant reiterated his complaints against Ms. Cook and criticized her comments regarding denial of his accusations against her.

Appellant also submitted a November 26, 1999 letter of warning regarding his mishandling of obsolete stamp stock. Ms. Cook noted that at an investigative meeting about the mishandling of obsolete stamps appellant was uncooperative and provided no information to the postmaster to determine whether a different outcome was warranted.

By decision dated May 4, 2001, the Office rejected appellant's claim finding that he had failed to implicate any compensable factors of his employment in the development of his emotional conditions. The Office found that the events implicated were either, nonfactual, unsupported by corroborating evidence and denied by the employing establishment or were factual, but were not compensable under the Federal Employees' Compensation Act. The Office found that the allegation that Ms. Cook introduced herself to him by stating that he was in the KMA (Kiss My A--) club and that she had fired a guy like him was false as it was uncorroborated and denied by Ms. Cook. Other unsupported and/or denied allegations were that Ms. Cook took an instant dislike to appellant, that she forced him to work very long hours, that she denied him straight pay for extra hours worked, and that he had an EEO complaint against Ms. Cook which was resolved. The Office found that further supported allegations were that Ms. Cook's suggestion about a special screen for his computer was insulting, that appellant was battered by a coworker, that nothing happened after the alleged assault, that she had said she wanted his head on a silver platter, and that a new supervisor was hired to "get" appellant. Factual but noncompensable events were noted to include that appellant was contacted by a telephone regarding the investigation, that he received a certified letter from the postmaster about attending the investigative interview, that he was not allowed to have his attorney at the investigative interview, that he received a letter of warning as a result of the interview regarding mishandling of obsolete stamps, that while he was on sick leave he was required to provide medical documentation, that the locks on his office were changed and he was so notified by Ms. Cook, that he could not come into work and speak to coworkers, that he was charged with LWOP (leave without pay) from November 22 through December 3, 1999. The Office found that it was not compensable that appellant was not provided with specific appeal rights with his letter of warning, that the letter needed correction, that appellant was demoted twice due to route shifts, and that Ms. Cook did not follow postal procedures regarding community notification 60 days prior to any route move. The Office found that it was not compensable that appellant was embarrassed that Ms. Cook changed his position, that his performance appraisal was not complete, that his EEO counselor refused to meet with him and his attorney, and that the employing establishment refused to reasonably accommodate him in a position free from contact with Ms. Cook.

By letter dated May 30, 2001, appellant requested an oral hearing before an Office hearing representative. On July 20, 2001 appellant advised that he would be submitting a great deal of additional evidence for his hearing.

A hearing was held on July 17, 2002 at which appellant testified. As he testified, appellant reiterated his previously discussed claims of threats, harassment, assault, discrimination, abuse, retaliation and punishment, and he testified about several other implicated factors. Appellant claimed that he got a letter of warning for failure to follow instructions regarding notification of customers in post office box policy, he claimed that he was nudged by a coworker, which he considered to be an assault, that an email from Ms. Cook to all employees about appellant having surgery was an invasion of privacy, and that he had to work overtime

when the station was short of carriers, for which he was not compensated, and which was the subject of an EEO complaint.

By decision dated September 11, 2002, the hearing representative denied modification of the prior decision finding that appellant had not implicated any compensable factors of employment. The hearing representative found that appellant had presented no evidence that he was harassed, discriminated against or was the subject of retaliation. He found that no EEO findings that he was treated unfairly were submitted and that basically appellant was unhappy with the way Ms. Cook was running the employing establishment, which was not compensable. The hearing representative found that all of the employment factors implicated by appellant were either not established as having occurred or were not compensable under the Act.

By letter dated March 30, 2003, appellant requested reconsideration of the hearing representative's decision. Appellant argued that the findings of Judge Warren of the Department of Labor and Industry in Montana should be applicable to his case under the Act. A copy of the July 3, 2001 decision was provided and stated that appellant left work with good cause attributable to his employment and therefore he was qualified to receive benefits beginning April 15, 2001, provided he meets the other qualification and eligibility requirements. Appellant claimed that Judge Warren found that Ms. Cook stated "so you are the guy in the KMA club. I fired a guy like you in Walla Walla," despite her denial of making such statement to the Office. He claimed that Judge Warren found that appellant had an accident but that Ms. Cook failed to file an accident report, and that he found that appellant was "struck" during a meeting on violence in the workplace, but that it was not followed up on. Appellant noted that Judge Warren stated that the employer had not shown that appellant could not perform his work without face to face interaction, and that he was bullied at work which produced disabling stress. Appellant argued that the Office should accept the findings of Judge Warren as facts. He also submitted multiple statements from coworkers addressing their experiences with and perceptions of Ms. Cook.

By decision dated July 1, 2003, the Office denied modification of the hearing representative's decision finding that much of the testimonial transcripts appellant referred to were not in the record before the Office and so could not be considered, that the fact the employing establishment declined to file an accident report about an unwitnessed event in which appellant allegedly slipped and fell but was not hurt was insufficient to demonstrate employer error or abuse, that statements taken out of context could not be determined to be verbal abuse, and that appellant had not proved that he was maliciously assaulted or the victim of violence. The Office also found that most of the "witness" statements were second hand or hearsay, and did not directly relate to appellant's claims.

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

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged,

and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.²

To establish appellant's occupational disease 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.³ Rationalized medical opinion evidence is medical evidence that 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 based on a complete factual and medical background of the claimant, 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.⁴

A claimant has not met the first burden when his statements are vague, unwitnessed, unsupported, inherently incredible, or with such discrepancies or inconsistencies that serious doubt is cast on the veracity of the claim. When a claimant makes allegations of employing establishment wrongdoing, harassment, discrimination or retaliation, he must submit corroborating evidence of a substantial, reliable and probative nature to support his claims, such as detailed and specific witness statements, supporting EEO findings or Merit Systems Protection Board findings, or supportive union arbitration results. Appellant did not meet this burden in the instant case.

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 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 Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁵ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Id.*

⁵ *Donna Faye Cardwell*, *supra* note 3; *see also Lillian Cutler*, 28 ECAB 125 (1976).

employment, and does not come within the coverage of the Act.⁶ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be “in the performance of duty.”⁷

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.⁸ 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.⁹ 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.¹⁰ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant’s emotional condition, then the medical evidence of record need not be considered.¹¹

Appellant did not allege that he developed an emotional condition arising out of his regular or specially assigned duties, or out of specific requirements imposed by his employment. He alleged, for the most part, that his condition was caused by supervisory harassment by Ms. Cook. The Board has held that actions of an employee’s supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.¹² However, in order for harassment to give rise to a compensable disability under the Act, there must be some evidence that such harassment did in fact occur. Mere perceptions of harassment alone are not compensable under the Act.¹³

In this case appellant’s allegations against Ms. Cook were rebutted by Ms. Cook and the employing establishment, and appellant provided no corroborating witness statements to demonstrate that he was harassed or discriminated against by Ms. Cook as alleged. Appellant, therefore, has failed to submit any specific, reliable, probative and substantial evidence in

⁶ *Id.*

⁷ See *Joseph DeDonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁸ See *Barbara Bush*, 38 ECAB 710 (1987).

⁹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁰ See *Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹¹ See *Donna Faye Cardwell*, *supra* note 3; see also *Lillian Cutler*, *supra* note 5.

¹² *Sylvester Blaze*, 42 ECAB 654 (1991).

¹³ *Ruthie M. Evans*, *supra* note 9.

support of his allegations. Appellant has the burden of establishing a factual basis for his allegations; however, the allegations in question are not supported by specific, reliable, probative and substantial evidence and have been refuted by statements from appellant's employer. Accordingly, the Board finds that these allegations cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them.

Appellant alleged that he was assaulted by a coworker in front of Ms. Cook, who did nothing, which caused him great anxiety and caused him to fear for his safety. The Board has held that physical contact by a supervisor or by a coworker, if substantiated by the evidence of record, may give rise to a compensable factor under the Act if the medical evidence establishes that a condition was thereby caused or aggravated.¹⁴ However, the coworker in question, Mr. Bengston, denied that he touched or hit appellant and Ms. Cook stated that she saw no such assault or touching. As appellant has not provided any corroboration that he was touched, nudged, elbowed or struck in any way during the meeting on violence in the workplace, he has not established that an assault occurred as alleged.

Several of appellant's other allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*¹⁵ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.¹⁶ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: being instructed to report for an investigative interview,¹⁷ receiving an incomplete performance evaluation,¹⁸ being denied a raise,¹⁹ not being paid for extra hours worked because he was a Special Exempt employee,²⁰ being demoted twice,²¹ being bypassed regarding subordinates

¹⁴ *Karen E. Humphrey*, 44 ECAB 908 (1993); *Alton L. White*, 42 ECAB 666 (1991); *Constance G. Patterson*, 41 ECAB 206 (1989).

¹⁵ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁶ See *Richard J. Dube*, 42 ECAB 916 (1991).

¹⁷ See *Patricia A. English*, 49 ECAB 532 (1998); *Bernard Snowden*, 49 ECAB 144 (1997).

¹⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 783 (1991).

¹⁹ See generally *William Karl Hansen*, 49 ECAB 140 (1997); *Ronald C. Hand* 49 ECAB 113 (1997).

²⁰ *Id.*

²¹ *Id.*

assignments,²² having the locks changed,²³ receiving a letter of warning,²⁴ and being charged with LWOP.²⁵ Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions, and therefore they are not compensable now under the Act.

Further, appellant argues that the findings of Judge Warren, from the Montana Department of Labor and Industry, as to the facts surrounding his employment situation, should be sufficient to establish that his allegations were truthful. However, the Board has explained that findings of other governmental agencies or bodies are not dispositive with regard to questions arising under the Act.²⁶ As the Office had already conducted fact-finding and determined that appellant's allegations were unfounded, Judge Warren's subsequent findings without fact-finding do not establish compensable factors of employment.

As appellant has failed to submit probative factual evidence to establish that he developed an emotional condition, causally related to a compensable factor or factors of his federal employment, he has failed to meet his burden of proof to establish his claim, and the medical evidence of record need not be considered.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated July 1, 2003 and September 11, 2002 are hereby affirmed.

Dated, Washington, DC
November 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²² See *Anna C. Leanza*, 48 ECAB 115 (1996).

²³ See *Daniel B. Arroyo*, 48 ECAB 204 (1996).

²⁴ See *Ernest St. Pierre*, 51 ECAB 623 (2000); *Sherry L. McFall*, 51 ECAB 436 (2000).

²⁵ *Id.*; see also *John Polito*, 50 ECAB 347 (1999).

²⁶ See *Ernest J. Malagrida*, 51 ECAB 287 (2000).