United States Department of Labor
Employees' Compensation Appeals Board

PATRICK DELIA, Appellant	)	
and	)	**Docket No. 04-1542**
	)	**Issued: July 15, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Hempstead, NY, Employer	)	

Appearances:
Patrick Delia, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 25, 2004 appellant filed a timely appeal from an April 22, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a finding that he had not established an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty. On appeal, appellant contends that employing establishment harassed him by taking unwarranted disciplinary actions and erroneously transferred him to a facility where he performed work outside of his job classification.

FACTUAL HISTORY

On July 11, 2002 appellant, then a 47-year-old mail process equipment mechanic, filed an occupational disease claim alleging that he sustained stress, depression and anxiety due to factors

of his federal employment. In a statement accompanying his claim, appellant attributed his condition to unwarranted disciplinary actions and rumors.

In a letter dated July 24, 2002, the employing establishment controverted the claim, noting that appellant filed the claim after receiving a notice of removal. The employing establishment enclosed a June 12, 2002 notice removing appellant effective July 15, 2002 due to improper conduct and failing to follow instructions.

Appellant submitted a statement dated September 11, 2002 in which he contended that he was erroneously terminated from employment in 1983, 1999 and 2002. He further alleged that managers Jeff Smith and Dominick Brunone created a "hostile work environment." Appellant maintained that Mr. Brunone issued him two letters of warning in 2001 because he failed to have the correct date on cancellation machines and failed to be regular in attendance. He related that this showed discrimination because other employees were not disciplined for incorrectly setting the date and as he had leave approved under the Family Medical Leave Act (FMLA). Mr. Brunone issued an emergency suspension which led to appellant's removal in 1999 for violating the zero tolerance policy on violence and failing to list misdemeanors on his employment application 20 years ago. Appellant asserted that Mr. Smith assigned him duties beneath his qualifications to humiliate him. He was also referred to the Employee Assistance Program (EAP) instead of an anger management program as required by a July 2000 arbitration decision. Appellant also asserted that he could not work overtime beginning November 8, 2000. In August 2002, appellant related that the employing establishment sent him to a training course and issued discipline which resulted in his removal because of allegations that he smoked cigarettes while attending training.

In a statement dated September 6, 2002, Georgiana Collins, a coworker, noted that appellant was fired for violating the zero tolerance policy but was subsequently exonerated. In a statement dated September 7, 2002, Joseph Puglisi, a coworker, indicated that Mr. Brunone harassed appellant.

In a statement dated September 9, 2002, Diane Melton, a shop steward, related that appellant received no disciplinary action until 1999 when a new manager, Mr. Brunone, arrived. She stated that Mr. Brunone accused appellant of trying to run him off the road until she produced evidence verifying appellant's whereabouts at the time of the alleged incident.

In a statement dated September 10, 2002, Larry Baronciani, a coworker, related that after Mr. Brunone arrived in early 1999 he began to hear "alarming rumors" about appellant. He also stated that he could not remember anyone else receiving disciplinary action for failing to change the date on a manual canceling machine.

Frederick Schearer, in a statement dated September 20, 2002, noted that other employees did not receive disciplinary action for putting the wrong date on cancellation machines and also indicated that he heard a rumor that appellant tried to run Mr. Brunone off the road.

The record contains a June 14, 1999 letter from Mr. Brunone placing appellant in emergency off-duty status. The record also contains a notice dated August 10, 1999 removing

him from employment for threats of violence and failing to list arrests and convictions on his employment application.

In an arbitration decision dated July 6, 2000, an arbitrator determined that the employing establishment did not have just cause to issue the August 10, 1999 notice of removal for violation of the zero tolerance policy on violence. The arbitrator found that appellant had not violated the zero tolerance policy because the statements upon which the employing establishment based its finding were contradictory. She further found, however, that the employing establishment had just cause to issue the notice of removal as appellant had "inexcusably falsified" his employment application. The arbitrator determined that termination from employment was not warranted and reduced the discipline to a suspension without pay beginning July 15, 1999 and ending the date of his reinstatement pursuant to this award. She found that his reinstatement was dependent upon appellant entering an anger management program selected by the union and management within 30 days and that the treatment provider should submit status reports regarding his participation in the program. The arbitrator determined that appellant should be moved to another employing establishment facility at the same grade and pay.

A room incident report dated May 14, 2002 indicated that on May 9, 16 and 17, 2002 housekeeping found evidence of cigarette smoking in appellant's room.

In a statement dated October 17, 2002, Mr. Smith related that the employing establishment transferred appellant in accordance with the arbitration decision to a position with the same grade and pay at a different facility. He stated that "the machinery he was trained on only existed in the office where we could not return him to" and thus he worked in any maintenance position, including performing custodial duties. Mr. Smith related that appellant's 1983 and 1999 removals were modified to suspensions without pay for about one year. He attempted to speak with the union about placing appellant in an anger management program but that the union continually delayed the discussion. Mr. Smith told appellant to go to the EAP counselor. He related that he spoke with the EAP counselor only regarding appellant's attendance. Mr. Smith indicated that when appellant's new work location began paying him, the postmaster reduced the amount of allowable overtime. Mr. Smith noted that appellant received training in air conditioner maintenance because there were no machines at his current work location and he did not "want to do custodial work."

In an arbitration decision dated November 18, 2002, an arbitrator determined that, in the July 2000 decision, the prior arbitrator effectively found that management had just cause for placing appellant on emergency off duty status. She further found that the employing establishment complied with the July 2000 arbitration decision in regards to appellant's salary and that the employing establishment did not err in failing to pay him during the 30-day notice period prior to the effective date of the notice of removal.

In a statement dated January 16, 2003, Mr. Brunone noted that appellant received a letter of warning in January 8, 1999 because he did not follow instructions and completed paperwork indicating that he had performed a task that in actuality had not been done. Mr. Brunone further related that he received a letter of warning on May 21, 1999 for failing to attend work regularly and that the absences were not covered by the FMLA.

By decision dated June 3, 2003, the Office denied appellant's claim on the grounds that he did not establish an injury in the performance of duty. The Office found that appellant had not established any compensable employment factors.

On June 29, 2003 appellant requested an oral hearing.[1] At the hearing, held on January 22, 2004, appellant related that in January 1999, after a change in management, he received unwarranted disciplinary actions. He received discipline for his attendance, even though he had approved leave under the FMLA, and because he did not change dates on a machine even though no one else was disciplined previously for this omission. Appellant related that, after being placed on emergency suspension, he was terminated in July 1999 for violating the zero tolerance policy and lying on his employment application. He was reinstated following arbitration but at reduced pay because it did not include Sunday premium pay, night differential or overtime. Appellant also noted that a provision of the arbitration decision provided that he would be sent to anger management training based on recommendations by the employing establishment and the union but was later told it was his responsibility. He went to an EAP counselor who told management the content of their discussions. Appellant indicated that he performed custodial work and that when management sent him to learn about air conditioning repair, he was accused of violating the policy on cigarette smoking and fired in July 2002. He related that the termination was currently in arbitration.

At the hearing, appellant's witnesses, Mr. McCazzio, Mr. Puglisi and Mr. Shearer, testified that no one had ever been disciplined for not changing the dye date on a machine. Mr. McCazzio also stated that appellant did have FMLA paperwork at the time he received discipline for attendance problems and that the discipline was subsequently resolved. Mr. Puglisi noted that appellant was transferred to a location without automatic equipment, and Mr. Shearer related that a police inspector showed him appellant's police record and was disappointed when he was uninterested.

In a decision dated April 22, 2004, a hearing representative affirmed the June 3, 2003 decision, finding that appellant had not established any compensable employment factors.

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 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

[1] Appellant submitted medical reports prior to the hearing. (R 66-69)

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

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.[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 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 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 Equal Employment Opportunity 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 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 is 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]

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

[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 ___ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

[10] *Beverly R. Jones*, 55 ECAB ___ (Docket No. 03-1210, issued March 26, 2004).

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

Appellant has not alleged that he developed an emotional condition due to the performance of his regular or specially assigned duties or out of a specific requirement imposed by his employment. Instead, he attributed his condition to receiving disciplinary actions which he believed were unwarranted and showed harassment and discrimination by management. The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur.[13] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.[14] Appellant's contention that the employing establishment engaged in improper disciplinary actions relates to administrative or personnel matters, unrelated to his regular or specially assigned work duties and do not fall within the coverage of the Act absence evidence of error or abuse.[15] Appellant maintained that management erroneously issued him a letter of warning in 1999 for failing to change the date on a machine even though no other coworkers were disciplined for the same mistake. He submitted statements as well as testimony at the hearing from coworkers who related that they could not remember another coworker being disciplined for failing to change the dye date on a machine. Mr. Brunone, a supervisor at the employing establishment, related that appellant received the letter of warning because he did not follow instructions and also submitted paperwork erroneously showing that he had performed the requested work. While appellant's coworkers generally asserted that other employees were not disciplined for failing to change the date on a machine, they did not name specific employees who made the same mistakes without receiving discipline and did not address whether the other employees had erroneously completed paperwork regarding the job. Thus, appellant has not established that receiving the 1999 letter of warning for failing to change the date on a machine constituted either error or abuse or harassment by the employing establishment.[16]

Regarding his letter of warning on May 21, 1999 for attendance irregularities, appellant maintained that his absences were covered by the FMLA. Mr. McCazzio, a coworker, stated that appellant's absences were covered by the FMLA and the discipline he received was resolved.

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

[12] *Id.*

[13] *Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004).

[14] *Id*.

[15] *Charles D. Edwards*, *supra* note 8.

[16] *See Bobbie D. Daly*, 53 ECAB 691 (2002) (disciplinary actions, absent a showing of error or abuse, generally fall outside the scope of coverage).

Mr. Brunone, however, asserted that the absences were not covered by the FMLA. Appellant has not submitted any documentary evidence establishing that his absences were covered by the FMLA or that the employing establishment acted erroneously or harassed him in issuing the May 1999 letter of warning.[17]

Appellant additionally attributed his emotional condition to his emergency suspension and removal in 1999 for violating the zero tolerance policy on violence and for failing to list misdemeanors on his employment application. An arbitrator, in a July 6, 2000 decision, determined that appellant did not violate the zero tolerance policy but further found that the employing establishment had just cause for issuing the notice of removal because he falsified his employment application. She reduced the discipline from a removal to a suspension without pay. The Board has held, however, that the fact that a disciplinary action is reduced is insufficient to establish error or abuse.[18] In a November 18, 2002 decision, an arbitrator found that the prior arbitrator in the July 6, 2000 decision effectively found that the employing establishment had just cause for issuing the emergency suspension. Appellant, consequently, has not shown that the employing establishment erred in an administrative or personnel matter by issuing the 1999 emergency suspension and notice of removal or submitted evidence sufficient to show harassment or discrimination by management.[19]

Appellant also asserted that the employing establishment harassed him by spreading rumors about him. In a statement dated September 2, 2002, Ms. Melton indicated that Mr. Brunone accused appellant of trying to run him off the road with his vehicle until she verified appellant's whereabouts at that time. Mr. Schearer submitted a statement dated September 20, 2002 in which he related that he heard a rumor that appellant tried to run Mr. Brunone off the road. Mr. Baranciani also stated that he heard "alarming rumors" about appellant after Mr. Brunone arrived at the work location. The Board has held, however, that an employee's reaction to gossip or rumors is a personal frustration that is unrelated to an employee's job duties or requirements, and thus it is not compensable under the Act.[20]

Appellant further maintained that, following his transfer pursuant to the July 2000 arbitration decision, he was assigned duties beneath his qualifications and did not receive his Sunday premium and night differential pay or overtime. The assignment of work is an administrative function and the manner in which a supervisor exercises his or her discretion falls outside the scope of the Act. Absent evidence of error or abuse, a claimant's mere disagreement or dislike of a managerial action is not compensable.[21] In this case, Mr. Smith related that appellant had been trained on machines that only existed at the facility where he was unable to

[17] *Id*.

[18] *See Kim Nguyen*, 53 ECAB 127 (2001).

[19] Regarding appellant's 2002 removal for violating the employing establishment's policy on cigarette smoking, the record contains no evidence sufficient to establish either error or abuse or harassment by the employing establishment. Appellant related that the matter is currently in arbitration.

[20] *Mary A. Sisneros*, 46 ECAB 155 (1994).

[21] *Barbara J. Latham*, 53 ECAB 316 (2002).

work pursuant to the arbitration decision. He sent appellant to learn to repair air conditioners because he did not want to perform custodial work. He further related that appellant's overtime was reduced by the postmaster of his new facility. An arbitrator, in a November 18, 2002 decision, found the employing establishment in compliance with the prior arbitrator's instructions regarding appellant's salary. Appellant has submitted no evidence of error or abuse by the employing establishment in the assignment of his work. Thus, he has not established a compensable employment factor.

Appellant contended that management erred in referring him to an EAP counselor rather than an anger management program. He also stated that the EAP counselor informed management of the content of their conversations. The July 2000 arbitration decision provided that appellant would enroll in an anger management program chosen by the union and management within 30 days of the date of the decision. Mr. Smith related that he tried to talk with the union about this matter but the union delayed the discussion. He stated that after "another incident involving anger" he referred appellant to an EAP counselor and spoke with the counselor only about attendance matters. Appellant has not established his referral to an EAP counselor was in error.

As appellant has failed to establish any compensable factors of employment, the Board finds that the Office properly denied his claim.

CONCLUSION

The Board finds that appellant has not established 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 April 22, 2004 is affirmed.

Issued: July 15, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board